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SUPREME COURT, U. S.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1963**

## No. 168

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**FRED L. SHUTTLESWORTH, PETITIONER,**

*vs.*

**CITY OF BIRMINGHAM.**

---

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA**

---

**PETITION FOR CERTIORARI FILED MAY 29, 1963**

**CERTIORARI GRANTED OCTOBER 14, 1963**

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1963**

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FRED L. SHUTTLESWORTH, PETITIONER,

*vs.*

CITY OF BIRMINGHAM.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

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[fol. 1]

# IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA IN AND FOR JEFFERSON COUNTY

No. 22506

---

CITY OF BIRMINGHAM, ALABAMA, A MUNICIPAL CORPORATION, Plaintiff,

vs.

FRED L. SHUTTLESWORTH, Defendant.

---

ORGANIZATION OF THE COURT

At a regular term of the Circuit Court of the Tenth Judicial Circuit of Alabama, at which the officers authorized by law to hold or serve said Court were serving, the following proceedings were had in the cause styled: No. 22506 The State City of Birmingham vs. Fred L. Shuttlesworth to wit:

[fol. 1a]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

APPEAL BOND—Filed June 30, 1961

(See opposite) ☞

22506

APPEAL

THE STATE OF ALABAMA
Jefferson County

CITY OF BIRMINGHAM

We, Fred L. Shuttlesworth, principal and Jas Esdale

sureties, acknowledge ourselves indebted to the City of Birmingham, a municipal corporation, in the sum of ($300.00) Three hundred DOLLARS,

for the payment of which, well and truly to be made, we bind ourselves, our administrators, and executors. But the condition of the above obligation is such, that whereas the above bounden principal was tried and convicted

on the charge of Count 1. Interferring With an Officer

~~Count 2~~ While Discharging His Duties Sec 856

Count 3.

and has prayed and obtained an appeal to the Circuit Court of Jefferson County, Alabama, from the judgment of the Recorder's Court of the City of Birmingham, adjudging him to pay a fine of $100.00 One hundred DOLLARS,

Costs ($5.00) Fine Dollars; Fees Dollars,

and to perform hard labor for 180 days. Days,

rendered the 2 day of June 1961.

affidavit on reverse side of this bond and be acknowledged by a Notary Public.

☞ IMPORTANT—All sureties must complete affidavit on reverse s

rendered the 2 day of June 1961

Now, if the said principal shall appear at present Term of the Circuit Court of Jefferson County, Alabama, and from term to term thereafter until discharged by law, then this obligation to be void, otherwise to remain in full force and effect. And as against this obligation we waive all right under the laws of Alabama to claim any personal property as exempt from levy and sale.

Defendant demands a trial by Jury.

Witness our hand and seals this 3 day of June 1961

| | Address |
|---|---|
| [illegible] (L. S.) | 3191 No 27th Ave |
| Jas Estelle (L. S.) | 809 - No 21st Street |
| By Jerry Alexander | Atty. In fact. |
| (L. S.) | |

Approved 5th day of June 1961

William Drury

Recorder of the City of Birmingham

(FILE ENDORSEMENT OMITTED)

[fol. 1b]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 22506

---

CITY OF BIRMINGHAM, ALABAMA, A MUNICIPAL CORPORATION, Plaintiff,

vs.

FRED L. SHUTTLESWORTH, Defendant.

---

COMPLAINT—Filed December 4, 1961

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that Fred L. Shuttlesworth, within twelve (12) months before the beginning of this prosecution, and within the City of Birmingham or the police jurisdiction thereof, did knowingly and wilfully interfere with, hinder, or prevent a police officer of the City of Birmingham; namely, Jamie Moore, Police Chief for the City of Birmingham, in the discharge of his legal duty in that said defendant did knowingly and wilfully place himself between said officers and a group of people commonly called "freedom riders" when said people were being placed in protective custody by said officer, and said defendant did knowingly and wilfully refuse to move out of the way of said police officer after being so ordered, contrary to and in violation of Section 856 of the General City Code of Birmingham of 1944.

William C. Walker, Attorney for Plaintiff.

[File endorsement omitted]

[fol. 2]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 22506

[Title omitted]

MOTION TO QUASH—Filed December 4, 1961

Comes now the defendant in this cause, and respectfully shows unto this Honorable Court the following facts:

1. That this defendant was arrested on to-wit, May 17, 1961, and charged with the violation of Section 856 of the General City Code of Birmingham, Alabama.

2. That the said arrest came as a result of defendant's presence at the Greyhound Bus Depot in Birmingham, Alabama, on said date, where he had purchased a ticket and attempted to board a bus for Montgomery, Alabama.

3. The information or complaint in this cause is so broad that the defendant is not sufficiently apprised of what he is called upon to defend against, and, therefore, the charge is vague, indefinite and uncertain.

4. The information or complaint does not charge the defendant with any offense under the laws of the State of Alabama.

5. The information or complaint upon which this cause is based is insufficient to support prosecution in this cause, in that no offense is alleged which is cognizable by this Honorable Court.

6. That the allegations of the information or complaint, and each count thereof are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend.

7. The said Section 856 of the General City Code of Birmingham, Alabama, under which said complaint is brought, as applied to this defendant, a negro citizen of the United States, violates Section 4, of the Constitution of

Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

[fol. 3] 8. That the aforesaid Section 856 of the General City Code of Birmingham, Alabama, as applied to this defendant is unconstitutional on its face, in that it in effect constitutes a deprivation of liberty, without due process of law, in violation of the Fourteenth Amendment of the United States.

9. That the said Section 856 of the General City Code of Birmingham, Alabama, as applied to this defendant in this cause, constitutes an abridgement of privileges and immunities guaranteed defendant as a citizen of the United States in violation of the Fourteenth Amendment to the United States Constitution.

10. That the said Section 856 of the General City Code of Birmingham, Alabama, as applied, constitutes a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

11. That this defendant has been tried in another action for conspiracy to Breach The Peace, and for a Breach of the Peace, in violation of Title 14, Section 119 (1) of the 1940 Code of Alabama, which said cause, numbered 4216, is now pending on appeal in this Honorable Court; that the violations complained of in the instant cause, grew out of the same facts and circumstances relied upon to support the aforesaid cause numbered 4216, now pending on appeal in this Honorable Court, and defendant avers that he is being put twice in jeopardy for one alleged offense, in violation of his right to due process of law under the Constitution and laws of the State of Alabama, and the Fourteenth Amendment to the United States Constitution.

Orzell Billingsley, Jr., Peter A. Hall, Attorneys for Defendant.

[File endorsement omitted]

[fol. 4]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 22506

[Title omitted]

DEMURRERS—Filed December 4, 1961

Comes now F. L. Shuttlesworth, defendant in this cause, and demurs to the information or complaint in this cause, and to each and every count thereof, separately and severally, and as grounds for such demurrer sets out and assigns the following, separately and severally:

1. The warrant, affidavit or information which supports the complaint in this cause, does not charge defendant with any offense under the constitution and laws of the State of Alabama.

2. That the information or complaint upon which this cause is based is insufficient to support prosecution of this cause, in that no offense is charged which is cognizable by this Honorable Court.

3. That the allegations of the information or complaint and each count thereof are so vague and indefinite as not to apprise this defendant of what he is called upon to defend.

4. That the ordinances of the City of Birmingham, Alabama relied upon to support the complaint in this cause, are invalid in that they violate Section 4, Article 1, of the Constitution of Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

5. That the laws or ordinances relied upon to support the complaint in this cause, constitute an abridgement of freedom of speech and assembly violative or rights and liberties secured the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

[fol. 5] 6. That the aforesaid statutes, laws or ordinances are unconstitutional on their face in that they are so vague

as to constitute a deprivation of liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

7. That the said Statutes, laws or ordinances, constitute an abridgement of privileges and immunities guaranteed defendant as a citizen of the State of Alabama and of the United States, in violation of the Fourteenth Amendment to the United States Constitution.

8. That the said Statutes, laws or ordinances constitute a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Orzell Billingsley, Jr., Attorney for Defendant.

[File endorsement omitted]

---

[fol. 6]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 22506

[Title omitted]

MOTION TO EXCLUDE THE TESTIMONY AND FOR JUDGMENT—Filed December 4, 1961

Comes now F. L. Shuttlesworth, defendant in this cause after all of the testimony and evidence for the City of Birmingham has been given and received in this cause, and moves this court to exclude said testimony and evidence and to give judgment for defendant, and as grounds for said motion sets out and assigns the following, separately and severally.

1. The City of Birmingham has not made a case against this defendant.

2. All of the testimony and evidence given in this cause indicates that the defendant during the time and on the occasion in question merely exercised rights and privileges given to him as a citizen of the State of Alabama and of

the United States of America, by the laws and the Constitution of the State of Alabama and of the United States of America, by the laws and the Constitution of the State of Alabama, and by the First and Fourteenth Amendments to the Constitution of the United States of America.

3. There has been absolutely no evidence introduced by the City of Birmingham to support the complaint in this cause.

4. None of the testimony or evidence offered proves defendant guilty of any criminal act or unlawful acts during the time in question.

Orzell Billingsley, Jr., Peter A. Hall, Attorneys for Defendant.

[File endorsement omitted]

---

[fol. 7]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

MINUTE ENTRY—December 4-5, 1961

---

THE STATE CITY OF BIRMINGHAM,

VS.

FRED L. SHUTTLESWORTH.

---

Appealed from Recorder's Court

(Interfering with an Officer While Discharging his Duties)

Honorable Geo. Lewis Bailes, Judge Presiding.

This the 4th day of December, 1961, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the defendant withdraws jury demand and the City of Birmingham files written Complaint in this cause; and defendant filed Motion to Quash and said Motion to Quash

being considered by the Court it is ordered and adjudged by the Court that said motion be and the same is hereby overruled; and defendant files demurrers and said demurrers being considered by the Court it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled and defendant being duly arraigned upon the written complaint of the City of Birmingham for his plea thereto says he is not guilty; and defendant files motion to exclude testimony and for judgment and said motion being considered by the Court it is ordered and adjudged by the Court that said motion be and the same is hereby overruled.

On this the 5th day of December, 1961, upon consideration of the pleadings and evidence submitted in this cause the Court being of the opinion that the defendant is guilty as charged in the complaint, and on recommendation of City Attorney Walker the Court assessed a fine of One Hundred and no/100 Dollars ($100.00) and costs against said defendant; it is therefore considered by the Court and it is the judgment of the Court that said defendant is guilty as charged in said complaint and that he pay a fine of One Hundred and no/100 Dollars ($100.00) and costs of this cause.

On this the 5th day of December, 1961, said defendant being in open court and having presently failed to pay the fine of One Hundred Dollars ($100.00) and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sen- [fol. 8] tence of the Law, that the defendant, the defendant, the said Fred L. Shuttlesworth, perform hard labor for the City of Birmingham for 52 days because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Fred L. Shuttlesworth, perform additional hard labor for the City of Birmingham for 180 days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to Fifty-one and 25/100 Dollars ($51.25), not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving Forty-seven and 25/100 Dollars ($47.25) taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for sixteen days, at the rate of Three Dollars ($3.00) per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended including the costs of feeding the defendant while in jail, for which let execution issue.

On this the 5th day of December, 1961, Notice of Appeal being given and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at Three Hundred Dollars ($300.00) conditioned as required by Law.

---

[fol. 9]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

APPEAL BOND—Filed December 5, 1961

Appeal Bond—Hard Labor Sentence

The State of Alabama
Jefferson County

Know All Men by These Presents, That we Fred L. Shuttlesworth principal, and James Esdale & Willie Esdale and Esdale Bail Bond Co. as sureties, are held and firmly bound

unto the State of Alabama, in the sum of Three Hundred Dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents; and we and each of us waive our rights of exemption under the Constitution and laws of the State of Alabama as against this bond.

The Condition of the Above Obligation Is Such, That whereas, the above bounden Fred L. Shuttlesworth was on the 5th day of Dec., 1961, convicted in the Circuit Court of Jefferson County, Alabama, for the offense of Interfering With An Officer While Discharging His Duties and had assessed against him a fine of One Hundred Dollars, together with the cost of this prosecution, and on the 5th day of December, 1961, on failure to pay fine was sentenced to perform hard labor for the City for 52 days, and an additional term for the cost, at the rate of seventy-five cents per day, and as additional punishment imposed the defendant was sentenced to perform hard labor for the City of Birmingham 180 days, from which sentence the said ..... ..... has this day prayed and obtained an appeal to the Court of Appeals of Alabama.

Now, If the Said Fred L. Shuttlesworth shall appear and abide such judgment as may be rendered by the Court of Appeals, and if the judgment of conviction is affirmed, or the appeal is dismissed, the said Fred L. Shuttlesworth shall surrender himself to the Sheriff of Jefferson County, at the County Jail, within fifteen days from the date of such affirmation or dismissal, then this obligation to be null and void, otherwise to remain in full force and effect.

[fol. 10] Given under our hands and seals, this the 5 day of Dec. 1961.

Rev. F. L. Shuttlesworth (L.S.), James Esdale (L.S.), Willie Esdale (L.S.), By A. E. Brooks, Atty in Fact (L.S.), Esdale Bonding Co. (L.S.), James Esdale, By A. E. Brooks, Atty in Fact.

Approved: Julian Swift, Clerk of the Circuit Court of Jefferson County.

[File endorsement omitted]

[fol. 11] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

CRIMINAL DIVISION

No. 22506

[Title omitted]

**Transcript of Proceedings—December 4, 1961**

Caption

The Above Styled Cause came on to be heard before the Honorable George Lewis Bailes, Judge, sitting without a jury, on the 4th day of December, 1961, at 4:45 P.M., when the following proceedings and testimony was heard.

APPEARANCES

Mr. Bill Walker, Assistant City Attorney, Birmingham, Alabama, for the Plaintiff.

Peter Hall and Orzell Billingsley, Attorneys at Law, Birmingham, Alabama, for the Defendant.

Reported by Jimmie Crumley.

---

Proceedings

COURT OVERRULES MOTION TO QUASH AND DEMURRERS

The Court: Let the Motion to Quash in Case No. 22506 be overruled and the Demurrers in 22506 be overruled.

Mr. Hall: We would like to have an exception.

The Court: Let's have an understanding, this case comes to this Court of course de novo from the Recorders Court, appealed therefrom, and with a demand for a jury, and nothing has been said to this Court about a jury.

Mr. Hall: If Your Honor please, we don't want a jury. Evidently there has been some error in that. We did not deliberately request a jury.

Mr. Walker: Your Honor, it could possibly be a clerical [fol. 12] error since so many of them do request jury trials, possibly it is merely a typing error from routine.

The Court: All right. With the statement of the defense and the prosecution as made in the record, it is sufficient for the Court. We will proceed.

Mr. Billingsley: If Your Honor please, we have some witnesses in the courtroom and we would like to ask for the rule.

The Court: The rule has been invoked.

(Witnesses placed under the rule.)

---

Evidence on Behalf of the Plaintiff

Jamie Moore, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Walker:

Q. State your full name, please?

A. Jamie Moore.

Q. What is your occupation?

A. I work for the City of Birmingham Police Department as Chief of Police.

Q. How long have you been so employed, Chief?

A. I have been in the Police Department a little bit over 25 years, and I have been Chief of Police a little over 6 years.

Q. Did you have occasion to go to the Greyhound Bus Station on or about May 17th of this year?

A. Yes, sir, I did.

Q. And approximately what time did you go to the Greyhound Bus Station?

A. I went to that bus station two or three or maybe four times that day, and one time was about this time of day. If I remember correctly, the last time I went was about 4 o'clock or something like that in the afternoon.

Q. Did you have occasion to arrest the defendant on any of the times you were at the bus station?

A. Yes, sir, I did. That was the last time.

Q. Now, Chief Moore, on the first occasion that you [fol. 13] were at the bus station did you see any Freedom Riders at that time?

A. I saw some of them that were in and around the station that I presumed were. Of my own knowledge I am sure I couldn't point them out, but they were pointed out to me as a part of the group that had come into Birmingham that later became Freedom Riders.

Q. Now, what occurred, if anything, on the first—what time did you say the first time you went to the bus station was?

A. I couldn't be for sure, but I went in the afternoon around this time, about 2 o'clock, I recall; and I went back again about 4 o'clock or in that neighborhood.

Q. Now, on the occasion you went back about 4 o'clock did you see any Freedom Riders at that time?

A. Yes, sir.

Q. What, if anything, did you do in regard to the Freedom Riders at that time?

A. When I got over to the bus station that time, why, I went through the bus station with some other officers and some superior officers in the Police Department, I know Captain Garrison was with me, and Captain Warren, I believe Captain Wall, and there was some other officers in and around the bus station, and the group was out on one of the platforms on the 6th Alley side of the bus station, and I went out and told that group of people in a voice loud enough to be heard who I was, I identified myself, and told them that due to the circumstances that day that I as Chief of Police was arresting them and taking them into protective custody of the City of Birmingham.

Q. Was the defendant there at that time?

A. As I went through the last door out of the bus station going towards that platform Freddie Lee Shuttlesworth and some other people I can't identify were near the pay station telephone towards the platform, but he was not out there at that time, and he came on out there about the time that I was talking to those people.

Q. And what happened then, if anything?

A. Well, he walked around to my left right close to me and got eventually between—I say eventually, it wasn't a [fol. 14] lot of time there, and I told him to leave the bus station. I called him by his name, I called him Fred, that he was not concerned with what was happening there, and he walked around and then got between me and some of those people I was talking to and I believe I asked him again to go—to get out of my way, and he said, if those people have to be arrested, why, he wanted to be arrested also.

Q. What did you do then, if anything?

A. I asked some of the officers to take him into custody at that time and I believe Officer T. T. Trammell, I believe was one of them, and I can't remember the other names, Mr. Walker.

Q. Now, Chief Moore, did you receive any complaints of any violence that occurred to these Freedom Riders on Mother's Day at the Trailway Bus Station—not these same ones, but of other Freedom Riders?

A. Well, of course, I was aware of some of the things that had happened at the Trailway Bus Station on Mother's Day, which was the 14th of May, and I was not in town when that was happening. It was handled by other members of the police department, but I knew about it.

And one of the times I went to the bus station, why, I drove back into where the buses park there and there was crowds of people in and around the bus station at that time. In fact, 6th Alley there from 18th to 19th Street, there was a lot of people in and around it. Some of them hollered at me and they were boisterous and in a jeering mood, and some of them hollered out, and I couldn't identify them, but it was "Take the police away and we will take care of it," or words to that effect.

Q. Now, Chief Moore, at 4 o'clock when you saw these so-called Freedom Riders where were the located when you saw them?

A. When I went in the last time when this happened, why, as you go into the bus station from the 19th Street side, as you walk straight back and keep to your left they were out under that shed there where the buses load. That would be on the 6th Alley side of the bus station under a shed.

Q. Did you attempt to arrest the Freedom Riders?

A. I did arrest them, or the officers did. I told them they were being arrested.

Q. What charge, if any charge?

[fol. 15] A. Protective custody of the City of Birmingham.

Q. Now, when did you first see the defendant on that occasion?

A. He was near the telephone booth just where the last door—close to where the last door is going out to the platform. He was inside the bus station when I saw him.

Q. Where were the Freedom Riders?

A. They were on beyond him back out under the shed not too far. Possibly as far as or further than the distance across this courtroom here.

Q. Now, at that time did you know the defendant in this case?

A. Yes, sir.

Q. Did you know where he lived?

A. I know where he lived.

Q. And where did he live?

A. He lived in North Birmingham. I don't know the exact house number.

Q. But he did live in Birmingham?

A. Yes.

Q. And this all occurred in the City of Birmingham?

A. Yes, sir.

Mr. Walker: That is all.

Cross examination.

By Mr. Hall:

Q. Chief Moore, when you saw this defendant on May 17th—incidentally, what time of day did you say it was that you arrested him?

A. I judge around 4 o'clock. That is my best recollection.

Q. Around 4 o'clock in the afternoon? Did you ascertain whether or not he was there at the bus station trying to get a bus to any particular place?

A. I did not.

Q. Do you know whether some of your officers questioned persons there in the bus station—

Mr. Walker: We object to that. It would call for hearsay, what someone else told him.

Mr. Hall: Chief Moore, as head of the Police Department of the City of Birmingham, and as such he gets reports from the officers he had dispatched there during a disturbance and I think as head of the Police Department [fol. 16] he can testify as to what reports he got from officers during the regular course of his duties.

The Court: I will leave it out.

Mr. Hall: We want an exception, Your Honor.

Q. Chief, when you first spoke to Fred Shuttlesworth how close was he to you?

A. He was closer to me than this Clerk of the Court here. I would say he wasn't over two to three feet from me.

Q. Two to three feet away?

A. That's right.

Q. Did you speak to him first or he speak to you?

A. I spoke to him.

Q. What did you say to him?

A. I told him, "Fred—" I called him Fred—I said, "You are not concerned in this. We are engaged in business," or words to that effect. "You get out of my way and don't bother us."

Q. Well, now, what occasioned you to speak to him at that time?

A. He was in my way and he was asking what was hap-

pening, what was taking place, and I had already announced to those people in a good loud clear voice who I was and my intention.

Q. Now, did he do anything other than ask those questions as to what was happening?

A. He walked around to my left and was between me and some of those people.

Q. Did he do any other act?

A. Your Honor, I would like for him to ask specifically, if he will, what he has in mind there.

Q. Did he do any physical act? Did he put his hands on anyone? Did he do anything other than ask the questions and walk around to your left?

A. He didn't put his hands on anyone that I saw, if that is what you are talking about.

Q. Was he profane, Chief, or loud?

A. He wasn't.

Q. Or argumentative?

[fol. 17] A. He was not profane.

Q. Was he loud and argumentative while talking to you?

A. I wouldn't say he was loud.

Q. Was there anyone else with him or near him except so-called Freedom Riders?

A. Well, there was people—there was quite a few people around that place and there were two or three men with him at that telephone booth and they could have been out there. I wouldn't say they were or were not.

Q. Would you say they stood between you and the Freedom Riders too?

A. No, they didn't.

Q. They moved on?

A. Well, now, I wouldn't say those same men came out there with him. I just don't know. There was quite a crowd out there.

Q. You arrested the Freedom Riders—actually you placed them in protective custody, is that correct?

A. Yes.

Q. You did not place a charge against them?

A. There was not a charge made against any of them.

Q. Did you arrest anyone else that day other than Fred Shuttlesworth at that place?

A. You mean did I arrest anybody?

Q. At that place and on that occasion?

A. I did not.

Q. There were other persons in and around the bus station on that occasion, as you formerly testified, I believe asking the police to leave and leave the Freedom Riders to them. Did you understand that to be a threat?

A. The people that were hollering at me were not in the bus station at that time. They were out in 6th Alley.

Q. They were out near the station or adjacent to it?

A. It is close to the station.

Q. Did you understand that request for the police to leave and leave the Freedom Riders to them to be a threat?

A. I understood there would be trouble if the police had [fol. 18] not been there and those people had been left alone.

Q. You didn't arrest any of those people, did you?

A. I didn't myself. If the Court will allow me, there were some people arrested, I am sure, that day. I don't know of my own knowledge—for different charges that day—we moved lots of people away from the bus station. Some more were arrested in and around there and i don't know their names

Q. What I was trying to do was pinpoint on this particular occasion at the time when you arrested Fred Shuttlesworth?

Mr. Walker: Your Honor, Chief Moore has answered the question. He said he didn't arrest anyone else. That was the question.

Q. That was the question, at that time?

A. I did not arrest anybody.

Q. Do you know if any person other than Fred Shuttlesworth and the Freedom Riders, who were taken into custody, was arrested at that time on that occasion at the Greyhound Bus Station?

A. You mean at that particular time?

Q. At that time?

A. I don't think there was anybody else arrested at that time.

Q. When Shuttlesworth was placed under arrest did he resist arrest?

A. I wasn't—I don't think he did. I did see him I believe after he was placed in the patrol car. I didn't see him if he did.

Mr. Hall: That is all.

Mr. Walker: That is all, Chief.

(Witness excused)

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CAPT. JAMES WALTON GARRISON, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Walker:

Q. State your full name, please?

A. James Walton Garrison.

Q. And occupation?

A. Captain of Police.

Q. How long have you been on the police force?

A. Fifteen years.

[fol. 19] Q. Captain Garrison, did you have an occasion to go to the Greyhound Bus Station with Chief Moore on May 17th of this year?

A. I was at the Greyhound Bus Station with Chief Moore. I didn't go over there with him.

Q. Did you go over there before Chief Moore?

A. I don't actually recall whether I did or not. I believe I did.

Q. Were you there when the defendant was arrested?

A. I was.

Q. And about what time was the defendant arrested, if you recall?

A. Around 5 o'clock in the afternoon.

Q. Now, what time did you first go to the bus station?

A. I went over there about 2:30 or 20 until 3 or something in that neighborhood.

Q. Did you stay over there continually from 2:30 or 3 until the time the defendant was arrested?

A. Outside of short trips across to City Hall and directly back, I was never gone over 10 or 15 minutes at a time.

Q. Were the Freedom Riders there at 2:30 or 3 o'clock when you arrived?

A. No, sir.

Q. What time did the Freedom Riders arrive, if you know?

A. They came in shortly before 3.

Q. Did you see them when they came in?

A. I did.

Q. Was the defendant with them?

A. I don't recall whether he was with them at that time or not.

Q. Do you know the defendant?

A. I know him.

Q. Now, when did Chief Moore—when did you see Chief Moore after the Freedom Riders arrived?

A. It was sometime between 3 o'clock and the time of the arrest. I can't place the time any closer than that.

Q. What did Chief Moore do in regard to the Freedom Riders when he arrived?

A. He placed them in protective custody.

[fol. 20] Q. What did he say to them; how did he notify them who he was?

A. He got them altogether in a group—they were at the door of the bus that was supposed to go to Montgomery—he got them in a group and notified them he was Chief of Police of the City of Birmingham, that things were such that it was dangerous to them and that he was placing them in custody for their own protection.

Q. Now, where were you at when the Chief placed them in protective custody?

A. Standing right beside him.

Q. And were you with other people, a group of you?

A. Yes.

Q. Who was in the group?

A. There was the Chief, myself, Capt. Warren, Capt. Wall and Officer Trammell was standing right nearby.

Q. Where was the defendant when Chief Moore placed the Freedom Riders in protective custody, if you know?

A. I don't know at the time he told them that.

Q. Now, what happened in regard to this defendant at the time Chief Moore placed the Freedom Riders into protective custody?

A. He stepped between the Chief and the group of so-called Freedom Riders and stated that if they were arrested he wanted to be arrested also, and the Chief told him to move on, and he continued to interfere. I myself told him once to move on.

Mr. Hall: Your Honor, I ask that the word "interfere" be stricken. It is a conclusion on the part of the witness. He can just tell what he did or said.

The Court: All right.

A. And Shuttlesworth kept milling around there and I recall distinctly one time him getting between the Chief and the Freedom Riders.

Q. Did he move when he was told to move?

A. He did not.

Q. Do you know where Shuttlesworth lived?

A. Yes.

Q. Where does he live?

[fol. 21] A. I don't know the house number.

Q. Is it here in Birmingham?

A. It is here in Birmingham.

Q. Let me ask you this. Did the Freedom Riders live in Birmingham?

A. That I don't know.

Q. How did they come to Birmingham?

A. They came to Birmingham on a Greyhound bus.

Q. What disposition was ultimately made of the Freedom Riders? How did the city rid itself of them?

A. They were finally got out of town on a bus Saturday morning following this Wednesday the 17th.

Q. And where were they taken, if anywhere?

A. Their designation was Montgomery.

Mr. Walker: I believe that is all.

Cross examination.

By Mr. Hall:

Q. Capt. Garrison, I believe you said you were standing right with Chief Moore or near him when he announced to these so-called Freedom Riders that he was taking them into protective custody?

A. That is correct.

Q. Did he make a general announcement to everyone in the bus station? Did he get the group together and talk to them, or how was it done?

A. He walked out to the group and asked that they all—I don't remember the exact words, but come in hearing distance of him so they could understand what he had to say and then he made the announcement.

Q. Where were they at that time?

A. They were on the loading dock of the bus getting ready to go to Montgomery.

Q. Was the defendant Fred Shuttlesworth over there at that time?

A. I don't know exactly what time Shuttlesworth came up. He was standing in the bus station as we came out the door.

Q. In your best judgment he was still in the bus station when the Chief made this announcement?

A. I don't know where he was when the Chief made the announcement.

[fol. 22] Q. You didn't see him at that time?

A. No.

Q. And you did have these so-called Freedom Riders in your line of vision at that time?

A. That is correct.

Q. You would have remembered if he had been standing there, wouldn't you?

A. Probably so.

Q. Were you standing there when the defendant came up and asked what was going on?

A. Yes.

Q. Well, how was that done? Did he do that in a loud voice?

A. No, no unusual voice.

Q. Just ordinary voice?

A. That is correct.

Q. And he was told what was going on, or was he told to go ahead, or do you recall?

A. I don't recall that.

Q. You don't know how he was answered? Well, did he at anytime while—how long did Fred Shuttlesworth stand there and talk to you and Chief Moore?

A. It would be hard to place it in minutes.

Q. Well, just a few minutes?

A. It was a very few minutes.

Q. Did he at any time exhibit any pugnacious attitude? Did he put his hands on anyone or offer any argument?

A. Not verbally, but he didn't move.

Q. But he asked what was going on and he didn't move?

A. To the best of my recollection he asked what was going on and he did make the one statement that if they were placed in jail he wanted to go too.

Q. But did he say these people were his friends and that they were together?

A. I don't recall that statement.

[fol. 23] Q. Did he make that statement?

A. I don't recall that statement.

Q. Did he say they were all waiting on a bus for Montgomery?

A. I don't recall that statement.

Q. Did anyone say they were trying to get a bus out of there for Montgomery, any of those so-called Freedom Riders?

A. Not at that time to my recollection.

Q. Well, were they asked whether or not they were—

Mr. Walker: We object to this, Your Honor, where they were going or whether they were going anywhere or not.

The Court: Let him answer it.

A. Would you repeat the question.

Q. Capt. Garrison, isn't it a fact the police checked all the persons in and around the bus station on that occasion to ascertain whether or not they were legitimate passengers?

A. That is correct.

Q. You checked everyone?

A. We might have missed some, but if we did we didn't intend to.

Q. But everyone who was in and about that station on that date proved to your satisfaction or to Chief Moore's satisfaction that they were legitimate passengers?

A. That is correct.

Q. Now, do you recall whether or not this defendant said to you and to Chief Moore that he was with this group and they were waiting on a bus for Montgomery trying to get a bus for Montgomery?

Mr. Walker: We object again, Your Honor. I don't see where it is material to any issue whether the defendant was with the group or not insofar as the charge is concerned.

The Court: Well, whether he was with them or not probably wouldn't be; what he may have said might be material.

A. I don't recall that statement being made.

Q. Could he have said something to that effect, Capt. Garrison? Do you have any impression that he did?

A. I don't have any impression that he did. It is possible he could have and I don't recollect it.

[fol. 24] Q. Did you yourself arrest the defendant, Capt. Garrison?

A. I think that Chief Moore actually made the arrest. I might have. I don't remember for sure which one of us did, but one or two of us told the officer standing close by to take him into custody.

Q. I will ask you this, Capt. Garrison. Did you have difficulty getting these Riders under protective custody—were they trying to flee or get away?

A. No.

Q. Did they resist?

A. No.

Q. Did the defendant's conduct in anyway make your arrest or your duty in putting these people under protective custody any harder?

A. Yes.

Q. It did? How was that?

A. By continually getting be'ween us and them—I say continually, I recall one distinct time he got between us, and he kept milling around and wouldn't move on when we asked him to, and things were kind of tense over there at that particular time.

Q. When you say tense you mean these Riders actually gave the impression they were going to resist this arrest?

A. No, I don't mean that at all. It was tense from the standpoint of the crowd we had over there and we felt they were in danger actually of their lifes—these Riders.

Q. You mean that the Riders were in danger from some of the others in the crowd?

A. That is correct.

Q. Did the others in the crowd make any threats or say anything?

A. They weren't close enough at that particular time. We moved them back. They were not in hearing distance of us probably other than legitimate passengers who had business about the bus station.

Q. Did you arrest any members of that crowd other than the Riders and Fred Shuttlesworth?

A. Not at that time. There were some arrested.

Q. I mean on this occasion at that time?

[fol. 25] A. I did not, but I don't know whether there were any arrested or not.

Q. You don't know of any arrests other than the defendant and the Freedom Riders?

A. At this particular time I do not.

Q. Capt. Garrison, I believe you testified that you were at the station from 2:30 until that night sometime almost all day?

A. In the neighborhood I would say of 2:30 until 11:30 that night.

Q. Do you know how long this defendant had been at the bus station before he was arrested?

A. No. I had seen him around and then I would miss him and he would be gone and I would see him back and then later on he would be back and I couldn't answer that question as to the length of time.

Q. Now, when you would see him he would be with this group of Freedom Riders?

A. Part of the time and part of the time he would be around the bus station.

Q. What time did they arrive at the bus station—the Freedom Riders?

A. I would say shortly before 3.

Q. And that was about the time you saw the defendant?

A. I can't recall when I first saw him that afternoon. I had seen him several times about before the arrest took place, but what particular time I can't recall just when I did first see him.

Q. Capt. Garrison, did you yourself check the tickets on that occasion?

A. I checked some tickets, but very few. I mostly had them checked.

Q. Did you yourself examine the defendant to see if he had a ticket?

A. No.

Q. Do you know if he was so examined?

A. Of my own knowledge I don't know, but he was.

Q. He was?

A. Yes.

Q. And he did have a ticket?

A. That is my understanding.

Mr. Hall: Thank you, Capt. Garrison.

[fol. 26] Redirect examination.

By Mr. Walker:

Q. Capt. Garrison, let me ask you, you say there was a crowd at the bus station on that occasion?

A. A very large crowd.

Q. And where was this crowd located?

A. We had them at this particular time backed off from the bus station to the best of my knowledge and recollection, I believe they were across the street on one side and across the alley on the other and across 19th Street side. We were having to keep them there with policemen or otherwise they wouldn't have been across there.

Q. Do you have an opinion as to the size of the crowd?

A. Not in numbers, I don't because, as I say, I was most of the time right in the station and around the station and I didn't work right at the crowd as I would otherwise.

Q. Did these so-called Freedom Riders, did they experience any difficulty in obtaining transportation?

A. Yes, they did.

Q. What was the nature of that difficulty?

A. They couldn't get a driver to take the bus out.

Q. Now, getting back to this crowd of people, how did they act or what was the emotion of the crowd?

A. The attitude was belligerent, storming and overall anger.

Q. Was it directed at anyone in particular?

A. It was directed at these Freedom Riders.

Q. Capt. Garrison, do you have any opinion as to how many police officers were employed at the Greyhound Bus Station on that occasion?

A. I would say at least 30 or 35 or maybe 40 on this particular occasion. Over the period of the week I guess we used 80 per cent of the entire force there at one time or another.

Q. What was their assignment while—the bulk of them, getting away from the routine officers that are at the bus station all the time, what was the assignment of the extra officers?

A. Well, we had some officers that stayed right with these Freedom Riders all the time. We had others that was as- [fol. 27] signed to keep back the crowds. We had others to work traffic at the different intersections. We had 19th Street blocked entirely and had 7th Avenue blocked between 18th and 19th Street to avoid cars just continuing in a circle. And some were inside the bus station and stayed in the waiting room the entire time.

Mr. Walker: I believe that is all.

Recross examination.

By Mr. Hall:

Q. Capt. Garrison, if I may question you—

Mr. Hall: May I put one or two questions, Your Honor? I was wondering if this was re-direct?

Mr. Walker: Mine was re-direct.

Mr. Hall: I would one or two questions on that.

Mr. Walker: All right.

Q. Capt. Garrison, I believe you said that you were present when the defendant was told to go ahead and leave?

A. That is correct.

Q. Now, did he refuse to leave?

A. By not leaving. He didn't verbally refuse.

Q. He didn't say he wasn't going to leave?

A. No. The only statement he made, as I recall, was if the Freedom Riders were going to jail—he didn't use that term of course—but he said if they were going to jail he wanted to go also, or words to that effect.

Q. Was that part of an effort to persuade you and Chief Moore not to arrest the Freedom Riders? Was that the tail-end of a statement or was that the entire statement?

A. That is all I recall of it. Of that particular statement that was the entire statement because I was standing right there and that was it.

Q. He did not say, "I am not going"?

A. He didn't say that.

Q. How long would you say the entire interchange took place? You said two or three minutes?

A. No, I did not say two or three minutes. I wouldn't say the exact time.

[fol. 28] Q. Do you have any judgment as to the time?

A. No. It was a short time. It wasn't long, but I wouldn't attempt to place it in minutes because at the time being we were under stress and strain.

Mr. Hall: That is all. Thank you.

(Witness excused)

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Capt. Jack A. Warren, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Walker:

Q. State your full name?

A. Capt. Jack A. Warren, Birmingham Police Department.

Q. How long have you been employed in the Police Department?

A. Fifteen and one-half years about.

Q. Did you have an occasion to go to Greyhound Bus Station on May 17th of this year?

A. I was on duty there, yes, sir.

Q. What was the nature of your assignment at the Greyhound Bus Station?

A. On that date there was a great deal of tension at the Greyhound Bus Station due to the Freedom Riders being there at that time, and I was stationed outside of the bus station proper, specifically, I was where the buses are loaded, and there was a great crowd of people out there. And during this time, I recall it was between 4 and 5 o'clock in the afternoon, Chief Moore came to the bus station and he was going to arrest the Freedom Riders and put them under protective custody, and he approached them and informed them of his name and his rank and so forth in the Police Department and told them what he was going to do, and at this time Reverend Shuttlesworth was in the group or to one side of it, and, as I recall, he pressed to the fore-front there and Chief Moore informed him if he interfered he would have to arrest him also, and the Reverend Shuttlesworth made the statement during the course of the conversation if he arrested them—I mean by that the Freedom Riders—he wanted him to arrest him also.

Q. Did Chief Moore at any time tell the defendant to move?

A. He did ask him to get out of the way and not interfere with him.

[fol. 29] Q. And what response did the defendant make to that?

A. He didn't make any.

Q. What did he do?

A. He remained there.

Q. Were you present when the Freedom Riders arrived in Birmingham on that occasion?

A. To the best of my knowledge and recollection I was at the bus station when they arrived there, yes, sir.

Q. Did the defendant come in with them, or do you know?

A. I don't know.

Q. Did the Freedom Riders have bus tickets?

A. I don't positively know the answer to that, but as I recall I think they did.

Q. Were they trying to go anywhere or do you know?

A. Yes, it seems to me they were trying to get on a bus.

Q. Were they able to catch a bus?

A. I don't remember. I cannot answer that question and be specific about it. Just what the reasons were that they could or couldn't go or whatnot, I left shortly after they were put under protective custody and I can't answer that question.

Q. I was thinking more specifically of the period of time prior to the time they were placed in protective custody if they had made any effort to leave Birmingham on a bus?

A. I believe they were waiting to get on a bus or making an effort to get on a bus as I recall.

Q. Let me ask you this. You say there was a large crowd gathered at the bus station on that occasion?

A. Oh, yes, sir.

Q. Do you have any opinion as to the size of the crowd?

A. I would hesitate to say, sir, except the bus station proper was crowded. There were a great many people in it and there were a great many people—I would say in the neighborhood of maybe a minimum of 250 or 300 on the streets nearby on all sides of the bus station.

Q. What was the attitude of these people?

[fol. 30] A. Well, as I say, there was a great deal of tension at the bus station during this period.

Q. How was this evident?

A. You could see it in the faces of the people in the crowd, you could tell it in the talking to themselves and their muttering and trying to press forward toward the bus loading platform. I was very much aware of that. As a matter of fact, that is the reason I was there.

Mr. Walker: I believe that is all.

Cross examination.

By Mr. Hall:

Q. Capt. Warren, what time did you leave the Greyhound Bus Station that night?

A. I am not sure. I think, as I recall, that I left there shortly after the Freedom Riders were placed in protec-

tive custody and I believe that was about to the best of my knowledge and recollection maybe somewhat after 5 o'clock.

Q. Now, I believe you testified that when Chief Moore approached these Riders to place them in protective custody where were they standing—where were the Riders standing? Do you recall?

A. To the best of my recollection when he approached them and told them who he was I believe they were standing by a Greyhound bus close to the entrance of the bus as I recall.

Q. That is on the outside of the station, isn't it?

A. Yes, sir, it was on the station proper ground but it was not on the inside of the station itself.

Q. Was there a lot of noise out there? Was the crowd making any noise?

A. Well, I wouldn't say there was a great deal of noise. There were a lot of people around the buses and the buses were starting and so forth like that that caused a lot of noise.

Q. I believe you said the defendant was standing with the group of Freedom Riders when the Chief walked up, is that true?

A. Yes.

Q. Was he standing and talking to them?

[fol. 31] A. I will qualify that this way. I don't know that he was with them all the time, but he was there at the time Chief Moore put them under protective custody.

Q. He was there when the Chief and Capt. Garrison came up and put them under protective custody?

A. Yes.

Q. Did you hear this defendant made a statement of this type—you were close enough to hear him speak, were you not?

A. Yes.

Q. Did you hear him make a statement to the effect that we are all here together trying to get a bus out for Montgomery?

A. I don't remember that. I don't mean that he didn't say it, I just don't recall it.

Q. Did you hear him say anything?

A. The only remark that I remember him making was to the effect, "If you arrest them, take me too," or "If you arrest them, arrest me too." And the Chief asked him not to interfere and to get back out of the way. Now, that is pretty much the only remark I remember being made.

Q. How was he interfering at that time?

A. Well, in this way—

The Court: Don't you have to ask what was said and done instead of having him define the word "interfering"?

Q. What did Chief Moore say to this defendant at that time specifically when he first walked up?

A. I don't recall that he addressed him specifically on his initial approach.

Q. Not of that, but what did he say to Fred Shuttlesworth when he first spoke to him?

A. I don't remember right off.

Q. Now, do you remember a conversation between Chief Moore and Fred Shuttlesworth? Were you present at that time?

A. The conversation, such as it was that took place between Chief Moore and the Reverend Shuttlesworth was at the fore-front of the group of Freedom Riders. The Chief was at the front of them at the bus and the Reverend [fol. 32] Shuttlesworth was there and the Chief endeavored then after he placed them under protective custody to get them down the ramp toward the waiting patrol wagon, and the Reverend Shuttlesworth was in between the Chief and the Freedom Riders going along with them after having been asked not to interfere.

Q. So, he was going along with them down the ramp?

A. That is correct.

Q. Towards the waiting patrol wagon?

A. In that general direction, yes.

Q. And was it at that time that he made the statement that you testified to previously?

A. No, there could have been some more words passed subsequent the initial statement, but at the time this conversation took place was at the bus before the movement started toward the patrol wagon, and it was about 20 feet I would estimate from the bus to the patrol wagon.

Q. Did either the Chief or Fred Shuttlesworth raise their voices in speaking to each other?

A. I think not, no.

Q. Did you see the defendant do any physical act to stop the Chief from placing these Riders in custody other than standing there as you testified?

A. I did not.

Q. Did the Riders resist arrest?

A. No.

Q. Did Fred Shuttlesworth resist arrest?

A. No.

Mr. Hall: That is all.

Mr. Walker: That is all.

(Witness excused)

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Officer T. T. Trammell, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Walker:

Q. State your full name, Officer Trammell?

[fol. 33] A. Officer T. T. Trammell, Patrolman, City of Birmingham.

Q. How long have you been so employed?

A. Approximately eight years.

Q. On May 17th this year did you have occasion to be at the Greyhound Bus Station at approximately 4:30 or 5 o'clock?

A. Yes, I did.

Q. Who were you with on that occasion?

A. I went over there from City Hall with Officer A. Y. Parker and my superior officer was over there also, Chief Moore, Capt. Garrison, and numerous other fellow officers.

Q. Now, were you present when the defendant was arrested?

A. Yes, I was.

Q. And who arrested the defendant?

A. I arrested him on the orders of—I believe it was Capt. Garrison. Of course, Capt. Garrison and Chief Moore were right there together and so was I, along with other officers, but I believe it was Capt. Garrison told me.

Q. When did you first see the defendant on that occasion at the time he was arrested immediately before that? Did you see the defendant say five minutes before or two minutes before?

A. Yes.

Q. What was the defendant doing at that time, if anything?

A. The defendant was standing in a crowd of the Freedom Riders there. They were in a circle, as a matter of fact, or a semi-circle all gathered up together and he was talking. Well, as a matter of fact, I was over there observing him a lot longer than five minutes before I placed him under arrest.

Q. Were you present at any time when Chief Moore was talking to the Freedom Riders?

A. Yes, I was.

Q. Where was the defendant at that time, if you know?

A. Well, I don't know what bus lane it was. You know, they have those stalls that the buses pull in when they take [fol. 34] passengers, but it was on the south side rear of the Greyhound Bus Station.

Q. Where was the defendant in relation to the Freedom Riders?

A. Well, he was standing alone then.

Q. He was with them?

A. With their luggage and stuff they had with them.

Q. What, if anything, did the defendant do when Chief Moore addressed the Freedom Riders?

A. Well, he listened to them. He was right there, and if my memory serves me right, he wanted to know why they were being placed under protective custody.

Q. Did the defendant move or do anything while the Chief was talking to the Freedom Riders?

A. When Capt. Garrison, if I may answer the question this way, asked me to place Shuttlesworth under arrest I took him by the elbow and told him he was under arrest

and first he was a little reluctant and pulled away. Is that what you are talking about?

Q. That is part of it. Where was the defendant standing when you placed him under arrest?

A. He was there about the same place. He never left that place on the south rear of the Greyhound Bus Station.

Q. Was he between Chief Moore and the Freedom Riders?

A. Approximately.

Q. Did you hear Chief Moore at anytime ask him to move out of the way?

A. Yes, I did.

Q. Where was the defendant standing when Chief Moore asked him to move out of the way?

A. I don't recall.

Q. Do you recall whether the defendant did move at that time or not?

A. No, sir, I don't.

Q. Officer Trammell, was there a crowd at the bus station on that occasion?

A. Yes, there was.

Q. Where was the crowd located, or describe the crowd?

A. Well, a crowd had gathered across the street on the [fol. 35] eastern side of 19th Street looking over to the bus station. As a matter of fact, they were on 7th Avenue on the north side and inside the bus, in front of it, and around it.

Q. What was the attitude of the crowd?

Mr. Billingsley: We object to that, Your Honor, as to the attitude of the crowd. He doesn't know what the attitude of the crowd was. It is not shown there was really a crowd.

The Court: What was your statement?

Mr. Billingsley: I say it has not been shown that there actually was a crowd as far as the testimony of this officer is concerned. However, I am specifically objecting to the question as to what was the attitude of the crowd.

The Court: All right.

Mr. Walker: Your Honor, have we established that there was a crowd? I thought we had?

The Court: Well, I think the objection was addressed to the attitude—what was the attitude.

Mr. Walker: Yes, sir.

Q. What did you observe the crowd, if anything?

A. In my best judgment there was a lot of unrest among both colored and white that were gathered there and, of course, naturally I don't know if they had tickets or not, but it just seemed like everything could just erupt in just one fast moment.

Q. Is the bus station your usual assignment?

A. No, sir.

Q. How many officers were working the bus station on that occasion, if you know?

A. Well, in my best judgment there was quite a number of them.

Q. Would you estimate it over 30?

A. I would say approximately. Not over, but around that.

Q. In that vicinity?

A. Yes.

Q. Do you have an opinion as to the normal number of police officers that work the Greyhound Bus Station?

[fol. 36] A. One on every shift.

Q. Do you know whether the Freedom Riders had tickets?

A. No, I don't.

Q. Do you know if they were going anywhere?

A. No.

Mr. Walker: I believe that is all.

Cross examination.

By Mr. Hall:

Q. Officer Trammell, were these persons had have been referred as Freedom Riders standing in a bus lane at some place where passengers usually go at the Greyhound Bus Station?

A. Yes. If I may elaborate a little further on that—

Q. Go ahead.

A. In the bus lanes—I say bus lanes, they are stalls or something and it is cement and the bus pulls right on up

next to the curb and pulls into it and they are numbered, and they were standing—as a matter of fact, there was a bus in there and they were standing next to it.

Q. Were they trying to board the bus or could you tell from their activities that they wanted to get on the bus or did not want to get on the bus?

A. Well, that is what it appeared to me. They were there with their luggage right in the stall like it appeared they were attempting or were going to.

Q. Now, at that time was Fred Shuttlesworth, the defendant here, was he standing there with them? Was he standing there at that time, Officer Trammell?

A. He was.

Q. Did he have his luggage or do you recall?

A. No, if he had his luggage it was setting on the curb. He didn't have anything in his hand as I recall.

Q. If it had it it was on the curb, but from all indications he was there with that crowd to catch that bus, is that correct?

A. That is correct.

Q. Was that at the time Chief Moore and Capt. Garrison came up or just prior thereto?

[fol. 37] A. Well, let me say this if I may again. That when I went over to the bus station me and Officer Parker, I didn't see the Chief until I guess about 10 of 15 minutes later. Of course, we were told just to walk around the bus station, but he was there with the Freedom Riders when the Chief come up and Capt. Garrison also.

Q. All the Riders and Fred Shuttlesworth was standing there at the bus when the Chief came up and said he was going to place them under protective custody, is that correct?

A. That is correct.

Q. Now, how close were you to them at that time?

A. About as close as I am from this gentleman here, the recorder.

Q. Would you say two or three feet in your best judgment?

A. Possibly.

Q. Do you know whether any of these Freedom Riders or the defendant Fred Shuttlesworth resisted arrest?

A. No.

Q. They didn't resist arrest at all, did they?

A. Well, let me elaborate on this again, if I may. When I placed Fred Shuttlesworth under arrest we took him immediately on the other side of the bus station to where Car 25 was parked. That was the car I was assigned to that day. And put him in the back seat of the car. What took place over there as far as the others are concerned after that, I don't know.

Q. This is something I can't quite get clear in my mind, Officer Trammell. You were told to arrest the defendant, is that correct?

A. That is correct.

Q. Did you observe the defendant break any ordinance or laws of the City of Birmingham before you arrested him?

Mr. Walker: We object to that, Your Honor. He was just following instructions.

The Court: Well, he can answer whether he arrested him on instructions or arrested him for some act he saw him do or fail to do. He can explain that.

A. I was arresting Fred Shuttlesworth on instructions [fol. 38] from my superior officer, Capt. Garrison.

Q. Now, Mr. Trammell, what I am trying to get at, did you hear the announcement that Chief Moore made to this assembled group of Riders?

A. I did.

Q. What in effect was that announcement?

A. He first come up and I was standing approximately two feet from the group and he said, "I am Jamie Moore, Chief of Police, City of Birmingham." And then I remember that, and then he went on and said a few more words and he said, "I am placing this group, the Freedom Riders, or you people, under arrest for protective custody." And that is when I arrested Fred Shuttlesworth.

Q. You arrested Fred Shuttlesworth right then?

A. Well, it might have been a couple seconds, I don't recall.

Q. Nothing more was said by the Chief?

A. Not that I recall, no.

Mr. Hall: That is all.
Mr. Walker: No further questions.

(Witness excused)

Mr. Walker: That is all for the City in this case, Your Honor.

(Recess)

Mr. Walker: Judge Bailes, is it all right if we let Trammeli go?
Mr. Hall: Yes.

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MOTION TO EXCLUDE TESTIMONY AND FOR JUDGMENT AND COURT'S OVERRULING OF MOTION

Mr. Billingsley: Your Honor, at this time we would like to make a motion to exclude the testimony in this case and ask for a judgment for the defendant, and we further say:

Come now F. L. Shuttlesworth, the defendant in this cause, after all the testimony and evidence for the City of Birmingham has been given and received in this cause and move the Court to exclude said testimony and evidence and to give judgment for the defendant, and as grounds for said motion, sets out and assigns the following separately and severally:

1. The City of Birmingham has not made a case against this defendant.

2. All of the testimony and evidence given in this cause [fol. 39] indicates that the defendant during the time and on the occasion in question really exercised rights and privileges given to him as a citizen of the State of Alabama and of the United States of America by the laws and constitution of the State of Alabama and of the United States of America, and by the First and Fourteenth Amendment to the Constitution of the United States of America.

3. There has been absolutely no evidence introduced by the City of Birmingham to support the complaint in this cause.

4. None of the testimony or evidence offered proves the defendant guilty of any criminal act or unlawful acts during the time in question.

We further say to the Court there is no necessity to go over the evidence involved in this case, and we also file our written motion to exclude the testimony and for a judgment in this case.

We ask that the Court grant the motion.

The Court: Please let the motion be overruled.

Mr. Billingsley: We take exception, Your Honor.

EVIDENCE ON BEHALF OF THE DEFENDANT

FRED L. SHUTTLESWORTH, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hall:

Q. State your name and address, please?

A. Fred L. Shuttlesworth, 3164—29th Avenue, North.

Q. Are you the defendant in this case?

A. I am.

Q. Were you on May 17th last at Greyhound Bus Station in the City of Birmingham after about 3 or 4 o'clock in the afternoon?

A. Yes, I had been there three or four hours.

Q. Directing your attention to that time on that particular occasion, were you at that time arrested by officers of the City of Birmingham?

A. After we had been there several hours, yes.

Q. Will you tell the Court what you were doing there at the Greyhound Bus Station on that occasion?

[fol. 40] A. A group of us from the city had joined with a group that had come in on a bus from Nashville and we were attempting to catch a bus out of the City of Birmingham to Montgomery. In fact, we had tried to catch two buses.

Q. Had you bought a ticket for Montgomery at that time?

A. Yes, before that time—before that hour.

Q. About what time did you go down to the Greyhound Bus Station that day?

A. Between 2 and 3 o'clock to catch the bus that was scheduled around that time—may have been a little after 2 or 3—I don't recall the exact moment.

Q. Did that bus go to Montgomery?

A. It did not. We tried to get on it for awhile and the driver refused to drive and we just stood up there at the bus ramp by the door, and after awhile the station manager announced that that one wasn't going and we decided to wait on the next one which was scheduled out around 5 o'clock.

Q. Now, had the next bus that was going to Montgomery, had it come at the time you were standing there with the group?

A. No.

Q. You were standing there waiting for that bus?

A. Yes.

Q. The group you were standing with, were these the so-called Freedom Riders?

A. I believe maybe 12 or more were from Nashville and there were 6 local people from Birmingham arrested in that group with myself.

Q. Six local people? Now, let's see if I can understand you. You mean that there were 12 persons who had come here from Nashville?

A. Twelve or more.

Q. And there were some six persons from Birmingham who had joined this group and were on their way to Montgomery; is that what you mean?

A. That is correct.

Q. On this particular occasion when Chief Moore came up and spoke to you, do you recall that?

[fol. 41] A. I was in the group.

Q. What did the Chief say when he walked up to the group?

A. He identified himself and said, "I am Chief Moore," or words to that effect, Chief of the Birmingham City Police, and we have decided to arrest you all for your own protection."

And I asked him what did he say, and he said he decided to arrest us for our own protection. And then he recognized

me in the crowd and he said, "Shuttlesworth, are you with the group?"

I said, "I am. We have been trying to get the bus out for two hours or more."

And he said, "Well, you go on, I don't want any trouble out of you."

And I said, "I am with the group and I want to catch a bus." And he said, "If you don't go on, I will have to arrest you." And I said, "Well, whatever happens on all them will happen to me; we are all together."

So, he asked—I don't know—one of the officers to arrest me, and they took me in the patrol car and the rest of them in the wagon. We all started off about the same time.

Q. You saw Officer Trammell who testified for the City of Birmingham just a little while ago?

A. Yes.

Q. Did you recognize him as the officer who arrested you on that occasion?

A. He and officer Garrison were the arresting officers, and he took me by the hand and said, "Fred, come on, you are under arrest."

Q. Did you go?

A. Yes.

Q. Did you resist arrest?

A. I did not.

Q. Did you at any time interfere with the—

Mr. Walker: We object to that, Your Honor.

The Court: Might be objectionable in that form.

Q. Did you at any time attempt to restrain Chief Moore or any officer of the City of Birmingham in and about their duty?

[fol. 42] Mr. Walker: We object, Your Honor. That is leading.

The Court: You might just find out what was said and what was done. That is always the safest area.

Q. Did you say anything other than what you had just testified to?

A. That was the substance of what was said.

Q. Is that all of what you said in substance?

A. Yes. After he repeated the second time for me to go home, then he said to this Officer Garrison, I believe, "Put him under arrest."

Q. Did the Chief at anytime ask you to move out of his way?

A. No. He said, "You go home, I don't want to be bothered with you, I don't want any trouble out of you."

Q. Where were you standing during this time?

A. There were at least 18 people in this group—12 or 18—or between 18 and 20, and I was in about the front. Maybe there were two or three standing right up with me in the front, and there was one standing maybe between me and the officers. I was back on the interfringe area of the group.

Q. Were you at anytime standing between the Chief and the group?

A. No.

Q. Or between Officer Garrison and the group?

A. The other policemen were closer to the group than Chief Moore was at all times.

Q. Did you at anytime offer any resistance?

Mr. Walker: We object to that.

The Court: Sustain.

Q. You testified that there were other persons in that group who lived here in Birmingham. Were they also detained in protective custody?

A. Yes, six of them—I believe six local citizens.

Q. And no one else in the group was arrested and charged with the violation of any law other than yourself, is that right?

A. That's right. Of course, I wasn't told there what I was charged with.

Q. What were you told?

A. Nothing but he just told them to place me under arrest. He talked to us as a group and told us we were under [fol. 43] protective custody, and then when he discovered me in the group he told me to go home.

Mr. Walker: We object to that form of questioning. We would rather it come from questions and answers. It is non-responsive.

The Court: Leave it in.

Q. Did the officer ever tell you why you were arrested?
A. I had been arrested some time before the charges were placed against me.
Q. Had you been carried to the jail before the charges were placed?
A. I was in the jail maybe 40 or 30 minutes at least.
Q. Before you were told what you were arrested for?
A. That's right.

Mr. Hall: That is all.

Cross examination.

By Mr. Walker:

Q. Shuttlesworth, did you live in Birmingham at that time?
A. I did.
Q. How long had you lived in Birmingham at that time?
A. Above eight years.
Q. And you are rather well known in Birmingham—I mean by that the Police Department knows you, in other words, you have acquired a reputation with the Civil Rights Movements?
A. I would presume so.
Q. The same would not be true for the six local people, is that true?
A. On the contrary, at least three of the people who were arrested were always seen with me at meetings and whereever I be by the police so that they knew at least three of the men.
Q. You say there were 18 of the Freedom Riders all tolled, is that correct?
A. If you count the local citizens, there were 18 or 19. I think the number of people that came in on the bus was 12 as I recall.
Q. Where did they come from?
A. From Nashville, Tennessee.
Q. And you know from your own knowledge that Chief Moore knows all six of these local people, is that correct, or three of these local people?
[fol. 44] A. I said he had seen them.

Q. Do you know for a fact that he knows them?

A. I think so. One or two of them surely.

Q. When has Chief Moore himself seen those people that you know of?

A. On several occasions at the church after the bombing we went down to have audiences with Chief Moore. We had had one or two I am sure.

Q. How many people did he see on the occasion after the bombing besides those two or three?

A. Chief Moore came out to the church several times and these particular persons to whom I refer were always with me. In fact, Chief Moore referred to one of them as a body guard for me one time in testimony in this court.

Q. Now, you have a church, is that correct—or did have a church?

A. I was pastor at that time of the Bethel Baptist in this city in North Birmingham.

Q. You have rode buses in and out of Birmingham before, have you not?

A. Yes, sir.

Q. And you were never arrested for riding a bus or anything of that nature?

A. You mean not local buses?

Q. I mean interstate buses, Greyhound buses and Trailway buses?

A. Not before that time as I recall.

Q. Now, these Freedom Rides are sponsored by CORE, is that correct?

A. There was a national group that came from Washington that was sponsored by CORE. The group that came Wednesday subsequent to Sunday May 14th were not sponsored by CORE. As I understand, they were a local group that decided themselves to do it.

Q. And these 12 people that came in from Nashville, were they all from Nashville?

A. Well, they were students maybe from different localities, but they were residents at that time at the colleges and universities in Nashville, Tennessee.

Q. All 12 of them from Nashville?

A. All 12 of them.

Q. In schools there?

[fol. 45] A. Yes.

Q. These 6 local people, were they in school in Nashville?

A. I believe one of the 6 local people was a girl who had been in school in Nashville but she was in Birmingham on vacation. There was two ladies arrested locally and she was one of those.

Q. Did you see the large crowd that had gathered around the bus station?

A. Now, you are referring to Wednesday May 17th?

Q. That's right, at the time you were arrested?

A. The groups that was around the bus station on Wednesday was nowhere near what the group had been there before. There were some people in the alley, yes.

Q. Wasn't there people standing out on 7th Avenue and 19th Street?

A. Well, if you refer to all of the day, the crowd gathered as the day wore on and as the Press talked about the activities of the group, the crowd became—as people got off from work the crowd became larger naturally.

Q. You were aware that there had been some trouble at the Trailway Bus Station—

Mr. Billingsley: We object to that and ask it be stricken from the record. This incident involves the Greyhound Bus Station and the charge is interfering with an officer and has nothing to do with some prior happening that occurred on another date.

The Court: Let him answer.

Mr. Billingsley: We except.

A. Read the question back, please.

(Question read)

Q. —the preceding week?

A. I was. I presume most everybody was aware of that.

Q. And you were aware that that involved Freedom Riders, is that correct?

Mr. Billingsley: Your Honor, I would like to object again and say that is immaterial, irrelevant and incompetent—that last question put by the counsel for the City of Birmingham.

[fol. 46] Mr. Walker: Your Honor, the fact whether it was true or not, we offer it that if he had heard it that it would be notice to him of the condition that were likely to exist at the Greyhound Bus Station a week later.

Mr. Billingsley: If Your Honor please, we will admit that there was some conditions that occurred on another time and another place, but as far as this defendant is concerned, he is charged with interfering with the business of Chief Jamie Moore. He is not charged in being in a situation or some violence that occurred at some prior time, and it is immaterial, irrelevant and incompetent.

Mr. Walker: We feel, Your Honor, that the atmosphere of Birmingham at the time is highly material insofar as what would constitute interference. If this had happened in an open field out in the country it would take probably more than it would under the conditions that existed here in Birmingham at that time, and we think it is material as tending to show the conditions of what existed a week before to show some relation to what existed on the occasion in question.

The Court: Let him answer.

Mr. Billingsley: We except.

A. Read the question back, please.

(Question read.)

A. The answer is yes.

Q. And you were aware that this trouble involved Freedom Riders, is that correct?

Mr. Billingsley: I would like to object again and assign the same grounds of objection as we had on the previous question.

The Court: The witness was previously distinguishing between the 12 riders out of Nashville and the local 6 who joined them as not being under sponsorship of CORE and was distinguishing them from other Riders. I think it is competent in that context. Please let him answer.

Mr. Billingsley: We take exception.

(Question read.)

A. What the Press calls Freedom Riders, yes.

Q. And those were different Freedom Riders at the Trail- [fol. 47] ways than the ones at the Greyhound Bus Station, is that correct?

A. The people at the Trailways Bus Station were adults from the North—who started in the North. The people who came in from Nashville were students mostly, young people.

Q. And the group from Nashville has no connection with CORE whatsoever?

A. That is my understanding. I think they were sponsored by the Nashville Christian Leadership or something like that.

Q. Were you instrumental in any way in bringing the Freedom Riders into Birmingham?

Mr. Hall: Your Honor, we object to this question. Immaterial, irrelevant and incompetent. Has nothing to do with the issues involved here, which is the charge of interfering with a police officer, whether or not he brought these people here or otherwise.

The Court: Let him answer.

Mr. Hall: We except.

A. To my knowledge I was not instrumental in bringing them into Birmingham, no, sir.

Q. You made no telephone calls or wrote letters?

A. I had received some telephone calls, if that answers your question, but I made none in connection with them, no.

Q. Did you receive any telephone calls from them?

A. From the group on the bus or from someone outside the city?

Q. From anyone in regard to—

A. Yes, I received the telephone calls— Am I required to answer that? The morning that the 12 students—the morning of the 17th I received a call from Nashville from a young lady identifying herself as Miss Diane Nash, concerning it.

Mr. Hall: May it please Your Honor, this defendant has been charged with the violation of the State Statute having to do with the events of past May 17th which action was tried in Judge Frances Thompson's Court and is now pending on appeal in the Circuit Court of the Tenth Judicial

Circuit. Now, the matters to be litigated are the very matters which we are going into here and now, and we want to object to the asking of these particular questions and requiring this witness to answer these questions when he will [fol. 48] have to be on trial and will have to answer them sometime soon. We say again they are incompetent; they have absolutely no bearing on the issues involved in this case, although the answers probably may or may not prejudice him in the defense of the case now pending in this court.

The Court: Please let him answer.

Mr. Hall: We except.

A. To answer your question, Miss Nash called and said some students were enroute at that time about 5 o'clock in the morning to Birmingham.

Q. And you never talked to any of the 12 until they arrived in Birmingham?

A. I did not.

Q. When did you first see the Freedom Riders from Nashville?

A. When they got off the bus, those that were allowed to get off at the Greyhound Bus Station, I believe around 11 o'clock or somewhere that morning.

Q. Now, did you buy a ticket to Montgomery?

A. I did.

Q. Did you have any luggage with you?

A. I had a hand valise I think.

Mr. Walker: I believe that is all.

Mr. Hall: We have no further questions.

(Witness excused.)

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VERA BROWN, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Billingsley:

Q. Will you state your name to the Court, please?

A. Vera Brown.

Q. Where do you live?
A. 1432—Tallapoosa Street.
Q. In the City of Birmingham?
A. Yes.
Q. County of Jefferson?
A. Yes.

[fol. 49] Q. Were you present on May 17, 1961 at the Greyhound Bus Station around anytime between the hours of 2—from 2 to 5 o'clock?
A. Yes, I was.
Q. Do you know the Reverend F. L. Shuttlesworth?
A. Yes.
Q. The defendant in this cause?
A. Yes.
Q. You do know him?
A. Yes.
Q. Did you know him on May 17, 1961?
A. Yes.
Q. Was he present on that occasion at the Greyhound Bus Station?
A. Yes.
Q. Do you recall whether or not there were any other Negroes present who had purchased tickets to travel to Montgomery, Alabama?
A. Yes, there were.
Q. Had you purchased a ticket?
A. Yes, I did.
Q. Where did you purchase your ticket?
A. At the ticket window.
Q. You purchased it from the ticket window to go where?
A. To Montgomery, Alabama.
Q. Do you know whether or not Reverend Shuttlesworth had purchased a ticket?
A. Yes, he had a ticket also.
Q. Where was his ticket supposed to take him to?
A. To Montgomery, Alabama.
Q. I ask you further if you recall the presence of Chief Jamie Moore at the Greyhound Bus Station on May 17th?
A. Yes, he was there.
Q. Do you recall the approximate time Chief Moore arrived at the bus station?

A. Between the hours of 4:30 and 5 o'clock. Around that time.

Q. Did Chief Moore have any conversation with you?

A. Not me personally.

[fol. 50] Q. Do you know whether he had any conversations with anyone else in your presence?

A. He spoke to a group of us.

Q. Spoke to a group of you?

A. A group of people.

Q. What did he say to you?

A. He identified himself and said he came to take us under protective custody.

Q. Was the Reverend Shuttlesworth present at that time?

A. Yes, he was.

Q. Did he have any conversation with Reverend Shuttlesworth?

A. Yes. He said something to him.

Q. I see. Do you recall what he said to Reverend Shuttlesworth?

A. He said, "Fred, we don't want you, why don't you leave or go home."

Q. He said what?

A. He said, "Why are you here? Why don't you leave and go home," or something to that effect.

Q. And what did Reverend Shuttlesworth say to him?

A. He said he was with the group and he had bought a ticket to go to Montgomery and he wanted to go.

Q. Was anything further said after then?

A. No, there wasn't.

Q. Do you recall whether or not Reverend Shuttlesworth was arrested?

A. Well, after that little conversation Mr. Moore told the officers to take him away and arrest him.

Q. Did the Reverend Shuttlesworth make any motions toward the Chief to attack him or anything of that nature?

A. No, he didn't.

Q. Did he refuse to permit Chief Moore to leave the bus station or to go to any other place in the bus station?

A. No, he didn't.

Mr. Billingsley: That is all.

Cross examination.

By Mr. Walker:

Q. Vera, you say that Chief Moore told the defendant, [fol. 51] said, "Fred, why don't you leave and go home?"

A. Yes, he did.

Q. And what did the defendant do then?

A. He replied by saying he was with the group.

Q. Isn't it a fact he said, "If you arrest them, arrest me too?"

A. Possibly.

Q. Shuttlesworth lives in Birmingham also, doesn't he?

A. You mean prior?

Q. He did at that time?

A. Yes, he did.

Q. And didn't Chief Moore tell you he was placing the group in protective custody?

A. Yes, he did.

Mr. Walker: That is all.

Redirect examination.

By Mr. Billingsley:

Q. Was Reverend Shuttlesworth with this group that the Chief said he was going to place in protective custody?

A. Yes, he was.

Q. Were you later taken to the City jail?

A. We were.

Q. How long were you confined there?

A. About 12 hours.

Q. Were you later charged with violating any of the City Ordinances of the City of Birmingham?

A. I don't know.

Q. You weren't tried in a court later on, were you?

A. No.

Q. But you were released and sent home?

A. Yes.

Q. Were there any other Negroes present in the group from Birmingham?

A. Yes.

Q. Do you recall who they were?
A. Yes, I do.
[fol. 52] Q. Who were they?
A. They were Mr. James Armstrong, the Reverend King, Mr. Lincoln Hendricks and Mr. Eugene—I can't think of his last name.
Q. Were they taken into custody also?
A. Yes, they were.
Q. And they were subsequently released?
A. Yes.
Q. Do you know whether or not they were charged with interfering with an officer—the lawful duties of an officer?
A. No, I don't.
Q. Were you charged with that?
A. No, I wasn't.
Q. Just one more question. Was a Miss C. therine Burke also present in this group?
A. Yes, she was.
Q. Does she live in Birmingham?
A. Yes.
Q. What was she doing at the time? Was she in school or working at the time this incident took place?
A. She was in school.
Q. Where?
A. Nashville, Tennessee.

Mr. Billingsley: That is all.

(Witness excused.)

Mr. Billingsley: That is all.
Mr. Walker: The City rests.
Mr. Billingsley: Your Honor, the defendant rests and we would like to renew our motion to exclude the testimony and a judgment for the defendant.
The Court: Same ruling.
Mr. Billingsley: Take exception.
Mr. Walker: We don't chose to argue, Your Honor.
Mr. Billingsley: We don't care to argue.

The Foregoing Was All the Testimony in the Case.

[fol. 53] (Whereupon on December 5, 1961 at 11:10 A.M. the Court read orders of the Court in the foregoing styled cause, after which the following occurred:)

Mr. Hall: If Your Honor please, did we offer a motion to exclude in this case?

Mr. Billingsley: Yes. We made an oral motion with the right to file a written motion which I will bring to the Court.

The Court: For the purposes of the record, does it make any difference?

Mr. Hall: No, sir.

The Court: I want you to have whatever you are entitled to. All right.

Mr. Billingsley: Your Honor, we would like to file notice of appeal in this case.

The Court: All right. The appeal bond will be $300.

[fol. 54] Court reporter's certificate (omitted in printing).

[fol. 55] Clerk's Certificate to foregoing transcript (omitted in printing).

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[fol. 56]

IN THE COURT OF APPEALS OF ALABAMA

SIXTH DIVISION 856

---

FRED L. SHUTTLESWORTH, Appellant,

v.

CITY OF BIRMINGHAM, Appellee.

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ASSIGNMENTS OF ERROR

Now comes the appellant, defendant in the case below, and shows unto the Court that manifest error has been committed on the trial of this cause in the court below, to the hurt and prejudice of this appellant and as grounds of error assigns the following separately and severally:

1. The court erred in overruling appellant's motion to quash filed in this cause. (Tr. 2, 3, 7, 11.)

2. The court erred in overruling the appellant's demurrers filed in this cause. (Tr. 4, 5, 7, 11.)

3. The court erred in overruling appellant's motion to exclude the testimony and evidence and to give judgment for defendant, to which ruling defendant duly took exception. (Tr. 6, 7, 38, 39, 52.)

4. The court erred in overruling appellant's objection to the question propounded to the defendant by the City of Birmingham as follows:

"You were aware that there had been some trouble at the Trailway Bus Station?"

5. The court erred in overruling appellant's objection to the question propounded to the defendant by the City of Birmingham as follows:

"You were aware that this trouble involved Freedom Riders, is that correct?"

6. The court erred in overruling appellant's objection to the question propounded to the defendant by the City of Birmingham as follows:

"Were you instrumental in any way in bringing the Freedom Riders to Birmingham?"

to which ruling defendant duly took exception. (Tr. 97.)

7. The court erred in overruling appellant's objection to questions asked of the appellant by the City of Birming-
[fol. 57] ham concerning telephone calls or letters received from some alleged "Freedom Riders", to which ruling defendant duly took exception. (Tr. 47, 48.)

Orzell Billingsley, Jr., Peter A. Hall, Attorneys for Appellant.

Certificate of Service (omitted in printing).

[fol. 58]

IN THE COURT OF APPEALS OF ALABAMA

OCTOBER TERM, 1962-63

6 Div. 856

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FRED L. SHUTTLESWORTH

v.

CITY OF BIRMINGHAM

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Appeal from Jefferson Circuit Court

JUDGMENT—October 23, 1962

February 8, 1962

Transcript Filed.

May 3, 1962

Come the parties by attorneys, and submit this cause on briefs for decision.

October 23, 1962

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

[fol. 59]

IN THE COURT OF APPEALS OF ALABAMA

OCTOBER TERM, 1962-63

6 Div. 856

---

FRED L. SHUTTLESWORTH

v.

CITY OF BIRMINGHAM

---

Appeal from Jefferson Circuit Court

OPINION—October 23, 1962

CATES, Judge

Shuttlesworth was found guilty under §856 of the City Code of Birmingham for interfering with the chief of police in the latter's taking certain Freedom Riders into "protective custody."

[fol. 60] Taking into protective custody we consider to mean the receiving of some one who places himself voluntarily under the protection of a peace officer.

Outside the bus station was a crowd of some 250 to 300 shouting for the police to give way, to let them take care of the Freedom Riders en route to Montgomery who, on the walkout of bus drivers, were stranded in Birmingham. The crowd was trying to press forward toward the bus loading platform. Streets were blocked—Nineteenth entirely; Seventh Avenue between Eighteenth and Nineteenth.

Shuttlesworth has argued to us that the chief of police was not in the discharge of any legal duty. *Harris* v. *Tuscaloosa*, 21 Ala. App. 392, 108 So. 768, does not apply here; nor are *People* v. *Papp*, 185 N. Y. S. 2d 907, and *White* v. *Edmunds* [1790], Peake 123, in point.

This argument can avail the appellant nothing, because his conduct was also that prohibited by §825 of the City Code which provides for the same degree of punishment as §856, §825 making it an offense against the City for any

person to commit an assault.[1] *Andersen* v. *United States*, D. C. Mun. App., 132 A. 2d 155; affirmed 253 F. 2d 335. See *Duncan* v. *Jones* [1936], 1 K. B. 218.

The definition of assault is well known from the common law. In *Kennedy* v. *State*, 39 Ala. App. 676, 107 So. 2d 913, we had occasion to consider some of the elements of resisting arrest.

There may be a species of resisting an officer without at the same time committing an assault. Cf. *Dist. Col.* v. *Little*, 339 U. S. 1; *Innes* v. *Wylie* [1844], 1 Car. & Kir. 257; *Patterson* v. *Sylacauga*, 40 Ala. App. 239, 111 So. [fol. 61] 2d 25. But under the wording of §856 opposing or interfering or hindering are alternatives to resistance, so that it is our view that an assault is an offense included in §856 in the alternative here pertinent.

Inasmuch as Shuttlesworth blocked the chief's path using words from which the intent to do so "in rudeness or in anger" could probably and rationally be inferred, there was no error in his conviction, since he could have been clearly convicted of a simple assault. The judgment below is due to be

Affirmed.

Price, P. J., and Johnson, J., concur in result.

---

[1] §825 reads: "Any person who commits an assault, or an assault and battery, upon another person, shall, on conviction, be punished as provided in section 4."

§856 reads: "Any person who knowingly and wilfully opposes or resists any officer of the city in executing, or attempting to make any lawful arrest, or in the discharge of any legal duty, or who in any way interferes with, hinders or prevents, or offers or endeavors to interfere with, hinder or prevent such officer from discharging his duty, shall, on conviction, be punished as provided in section 4."

§208 reads: "The chief of police or any policeman of the city has authority and it is his duty to make arrests for offenses against the laws of the state in all cases where such authority is now or shall hereafter be conferred on such officers by the laws of the state, and in making such arrests, whether with or without a warrant, they shall have all the authority conferred, and be subject to all the duties imposed upon such officer, by the laws of Alabama, in existence now or that may hereafter be enacted."

[fol. 62]

IN THE COURT OF APPEALS OF ALABAMA

SIXTH DIVISION No. 856

[Title omitted]

APPLICATION FOR REHEARING—November 7, 1962

Now comes the Appellant in the above styled cause and respectfully moves the Court for a rehearing of this cause, and prays that upon such rehearing, that, the Order and Judgment of this Court, made and entered on the 23rd day of October, 1962, affirming the decision of the Circuit Court of Jefferson County, Alabama, finding Appellant guilty of a violation of Section 856 of the City Code of Birmingham, Alabama, of 1944, and fixing his punishment and fine at $100.00 and One Hundred Eighty (180) days at hard labor for the City of Birmingham, be set aside and held for naught, and that in lieu thereof a Judgment and Decree of this Court made, and entered, reversing the said Judgment and sentence of the Circuit Court of Jefferson County, Alabama.

Peter A. Hall, Orzell Billingsley, Jr., Attorneys for Appellant.

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IN THE COURT OF APPEALS OF ALABAMA

OCTOBER TERM, 1962-63

6 Div. 856

[Title omitted]

ORDER OVERRULING APPLICATION FOR REHEARING—November 20, 1962

It is ordered that the application be and the same is hereby overruled.

Per Curiam.

[fol. 64]

IN THE SUPREME COURT OF ALABAMA

No. 6 Div. No. 940 SIXTH DIVISION

---

FRED L. SHUTTLESWORTH, Appellant,

vs.

CITY OF BIRMINGHAM, Appellee.

---

PETITION FOR CERTIORARI—Filed December 5, 1962

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama*

1. Comes the Appellant, by and through his Attorneys, Peter A. Hall and Orzell Billingsley, Jr., and respectfully petitions this Honorable Court to review, revise, reverse and hold for naught that certain Judgment of the Court of Appeals rendered on to-wit: October 23, 1962, wherein Fred L. Shuttlesworth was Appellant and the City of Birmingham was Appellee, which Judgment affirms a Judgment of the Circuit Court of Jefferson County, Alabama.

2. Your petitioner avers that application to the Court of Appeals for a Rehearing of said cause and Brief in support thereof were duly filed by your petitioner within the time required by law, and that said application for rehearing was overruled by said Court of Appeals on the 20th day of November, 1962.

3. Your petitioner respectfully shows unto the Court that this cause arose from a complaint filed by the City of Birmingham, charging your petitioner with violating Sec. 856 of the General City Code of Birmingham, viz:

> "Any person knowingly and wilfully opposes or resists any officer in executing or attempting to make any lawful arrest, or in the discharge of any legal duty, or who in any way interferes with, hinders or prevents, or offers or endeavors to interfere with hinder or prevent such officer from discharging his

duty, shall on conviction be punished as provided in Section 4.

4. Your petitioner filed a Motion to Quash the Complaint and Demurrers to the Complaint, on grounds that the Complaint was so vague and indefinite as not to apprise the Appellant of what he was called upon to defend, and further, that the ordinance which formed the basis of the [fol. 65] prosecution, as applied to appellant; constituted an abridgement of the privileges and immunities guaranteed by the Constitution of the United States and that the ordinance was unconstitutional on its face.

5. The Court overruled the Motion to Quash and the Demurrers whereupon petitioner was tried without a jury, and was found guilty of interfering with an officer in the performance of his lawful duties and fined One Hundred ($100.00) Dollars and costs, and sentenced to a term of One Hundred & Eighty (180) days of hard labor for the City of Birmingham.

6. Your petitioner filed a Motion to Exclude the Evidence, at the close of the City's case, which Motion was denied. After judgment and sentence, petitioner filed a Motion for a New Trial, which Motion was denied, and petitioner perfected his appeal.

7. Petitioner on appeal argued that at the time in question, the Chief of police was not in the discharge of any lawful duty. However, the Court of Appeals discounted this argument in its opinion and found that petitioner's conduct in blocking the Chief's path, attended with words from which it could "probably" and "rationally" be inferred that he intended to do so, "in rudeness or in anger", amounted to an assau't prohibited by the General City Code of Birmingham, Section 825. The Court further found that an assault is included in Section 826.

8. That the Propositions of Law involved, which petitioner claims should be reviewed and revised by this Court, are as follows:

A. That the Ordinance and Complaint, the basis of the prosecution, are unconstitutional on their face,

that they are so vague, indefinite and uncertain as to constitute a deprivation of liberty, without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

B. That the Ordinance and Complaint, the basis of the prosecution and conviction, as applied to petitioner, constitute an abridgement of the privileges and immunities, and a denial of due process of law, the equal protection of the laws, all in violation of the Fourteenth Amendment to the United States Constitution.

[fol. 66] C. That your petitioner's action might constitute an assault on the Chief of Police.

Wherefore, Your petitioner most respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of Alabama, commanding and requiring said Court to certify and send to this Court, on a day certain to be designated by this Court, a full and complete transcript of record, and all proceedings of said Court of Appeals of Alabama, in the Cause numbered and entitled aforesaid, to the end that this cause may be reviewed and determined by this Honorable Court, as provided by law and the rules and practice of this Court, and that this Court thereupon proceed to review and correct the errors complained of and to reverse the Judgment of the Court of Appeals or render such Judgment as said Court should have rendered.

Petitioner prays that this Honorable Court suggest and require the Court of Appeals to Stay or recall its Certificate of Affirmance of said cause, during the pendency of this petition.

And petitioner prays for such other, further and additional relief in the premises as to this Court may seem appropriate, and to which he may be entitled, and your petitioner will ever pray.

Respectfully submitted,

Peter A. Hall, Orzell Billingsley, Jr., Attorneys for Appellant.

[fol. 67] *Duly sworn to by Peter A. Hall, jurat omitted in printing.*

Certificate of Service (omitted in printing).

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[fol. 68]

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1962-63

6 Div. 940

---

FRED L. SHUTTLESWORTH

v.

CITY OF BIRMINGHAM

---

Petition for Writ of Certiorari to Court of Appeals

OPINION—December 20, 1962

MERRILL, Justice.

The petition for certiorari to the Court of Appeals must be stricken because it is not on transcript paper. Supreme Court Rule 32; *Ex parte Cranmore*, 129 So. 2d 688; *Ex parte Davis*, 269 Ala. 58, 110 So. 2d 306; *Accardo* v. *State*, 268 Ala. 293, 105 So. 2d 865; *McDonald* v. *Amason*, 267 Ala. 654, 104 So. 2d 719; *Ladd* v. *State*, 266 Ala. 586, 98 So. 2d 59.

Petition for Writ of Certiorari Stricken.

Livingston, C. J., Simpson and Harwood, JJ., concur.

[fol. 69] [File endorsement omitted]

IN THE SUPREME COURT OF ALABAMA

No. 940 SIXTH DIVISION

[Title omitted]

APPLICATION FOR REHEARING—Filed January 4, 1963

Now comes petitioner, in the above styled cause, and respectfully moves this Honorable Court to grant to him a Rehearing in said cause, and reverse, revise and hold for naught its judgment rendered on to-wit, the 20th day of December, 1962, denying petitioner the Writ of Certiorari and striking the petition, and to enter an Order reinstating petitioner's said petition, and directing that a Writ of Certiorari be issued out of and under the Seal of this Court, to the Court of Appeals of Alabama, to the end that this cause may be reviewed and determined by this Honorable Court.

Appellant further moves the Court to grant a Stay of Execution in this cause, during the pendency of this Application for a Rehearing.

Submitted herewith is a Brief and Argument, in support of said Motion.

Peter A. Hall, Orzell Billingsley, Jr., 1630 Fourth Avenue, North Birmingham, Alabama, Attorneys for Appellant.

[fol. 70]

IN THE SUPREME COURT OF ALABAMA

The Court Met Pursuant to Adjournment

Present: All the Justices

6th Div. 940

[Title omitted]

ORDER STRIKING PETITION FOR CERTIORARI—
December 20, 1962

Comes the Petitioner and the petition for Writ of Certiorari to the Court of Appeals being submitted on briefs and duly examined and understood by the Court,

It Is Considered and Ordered that the petition is hereby stricken at the cost of Petitioner for which costs let execution issue.

Opinion by Merrill, J.

Livingston, C. J., Simpson and Harwood, J. J., concur.

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IN THE SUPREME COURT OF ALABAMA

Present: All the Justices

6th Div. 940

[Title omitted]

ORDER OVERRULING APPLICATION FOR REHEARING—
February 28, 1963

It Is Ordered, that the application for rehearing filed on January 4, 1963, be and the same is hereby overruled.

No Opinion Written on Rehearing.

[fol. 71] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 72] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 73]

SUPREME COURT OF THE UNITED STATES

No. 168, October Term, 1963

---

FRED L. SHUTTLESWORTH, Petitioner,

vs.

CITY OF BIRMINGHAM

---

ORDER ALLOWING CERTIORARI—October 14, 1963

The petition herein for a writ of certiorari to the Court of Appeals of the State of Alabama is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice White took no part in the consideration or decision of this petition.

FILED
MAY 29 1963
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

NO. [redacted]/163

FRED L. SHUTTLESWORTH,

*Petitioner,*

—v.—

CITY OF BIRMINGHAM,

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

JACK GREENBERG
JAMES M. NABRIT, III
GEORGE B. SMITH
10 Columbus Circle
New York 19, New York

PETER A. HALL
ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue, North
Birmingham, Alabama

*Attorneys for Petitioner*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

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FRED L. SHUTTLESWORTH,

*Petitioner,*

—v.—

CITY OF BIRMINGHAM.

---

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Alabama Court of Appeals, entered in the above entitled case on October 23, 1962, rehearing of which was denied on November 20, 1962. A petition for certiorari was stricken by the Supreme Court of Alabama on December 20, 1962, and rehearing was denied February 28, 1963.

### Citation to Opinions Below

The opinion of the Alabama Court of Appeals (R. 59) is reported at 149 So. 2d 921 and is set forth in the appendix hereto, *infra*, p. 1a. The opinion on denial of certiorari by the Supreme Court of Alabama (R. 68) is reported at 149 So. 2d 923 and appears in the appendix, *infra*, p. 6a.

## Jurisdiction

The judgment of the Alabama Court of Appeals (R. 58) was entered on October 23, 1962, *infra*, p. 4a. The Application for Rehearing was overruled on November 20, 1962 (R. 62), *infra*, p. 5a.

A Petition for Writ of Certiorari filed in the Supreme Court of Alabama was stricken on December 20, 1962 (R. 70), *infra*, p. 7a; and Application for Rehearing was overruled on February 28, 1963 (R. 70), *infra*, p. 8a.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257 (3), petitioner having asserted below, and claiming here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

## Questions Presented

1. Whether petitioner was denied due process of law when he was charged, tried and convicted under a law prohibiting interfering with a police officer, but the conviction was affirmed only on the ground that he had committed another crime for which the same sentence might be imposed, i.e., assault, even though there had been no accusation or trial on the issue of assault.

2. Whether petitioner was denied due process of law by his conviction on a charge of interfering with a policeman while discharging his legal duties on a record devoid of any evidence of any elements of the crime.

3. Whether petitioner was denied due process where he was convicted under a law which failed to give adequate notice that his conduct was prohibited.

4. Whether there is an adequate non-federal ground to support the judgment below where the Alabama Court of Appeals (from whose judgment the petition seeks a writ of certiorari) ruled against petitioner on the merits, but the Alabama Supreme Court struck a petition for writ of certiorari that sought to invoke its discretionary jurisdiction on the ground that the petition was on the wrong size paper.

## Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 856 of the General City Code of Birmingham.

> "Any person who knowingly and wilfully opposes or resists any officer of the city in executing, or attempting to make any lawful arrest, or in the discharge of any legal duty, or who in any way interferes with, hinders or prevents, or offers, or endeavors to interfere with, hinder or prevent such officer from discharging his duty, shall, on conviction be punished as provided in section 4."

and Section 825 of the General City Code of Birmingham,

> "Any person who commits an assault, or an assault and battery, upon another person, shall, on conviction, be punished as provided in section 4."

## Statement

Petitioner was arrested May 17, 1961, at the Greyhound Bus Station in Birmingham, Alabama and charged with violating Section 856, General City Code of Birmingham. The complaint (R. 1B) stated that petitioner Shuttlesworth:

> . . . did knowingly and wilfully interfere with, hinder, or prevent a police officer of the City of Birmingham; namely, Jamie Moore, Police Chief for the City of Birmingham, in the discharge of his legal duty in that said defendant did knowingly and wilfully place himself between said officers and a group of people commonly called 'freedom riders' when said people were being placed in protective custody by said officer, and said defendant did knowingly and wilfully refuse to move out of the way of said police officer after being so ordered, contrary to and in violation of Section 856 of the General City Code of Birmingham of 1944.

Petitioner Shuttlesworth went to the Greyhound Station about two or three o'clock to catch a bus to Montgomery, Alabama (R. 40). He was in a group of "[t]welve or more" persons from Nashville, Tennessee and "six persons from Birmingham," all of whom had tickets to travel to Montgomery (R. 23, 25, 40). They were unable to take the bus which left "a little after 2 or 3" because the scheduled trip was cancelled when the driver refused to drive (R. 40). Shuttlesworth and his friends decided to wait for another bus which was due to leave "around 5 o'clock" (R. 40).

Around 4 P. M. (R. 15) the Chief of Police decided to arrest the group and take them into "protective custody" (R. 14, 15). A crowd, described by one officer as "belligerent" (R. 26) and by another as not making a great deal of noise (R. 30), was gathered outside the station.

The group of travelers was standing on the platform of the bus station preparing to board a bus (R. 21, 36) when the Chief told them he was placing them under arrest and in the "protective custody" of the City (R. 20, 21). All, except petitioner, were later released without charges being placed against them (R. 17).

The Chief, who ordered Shuttlesworth's arrest (R. 14), testified that when he told the group they were under arrest, Shuttlesworth walked up to him and he told Shuttlesworth to leave the station (R. 13, 14). Shuttlesworth "walked around and then got between me and some of those people I was talking to" (R. 14). The Chief again asked Shuttlesworth to leave and he replied that "if those people have to be arrested, why, he wanted to be arrested also" (R. 14). Chief Moore further testified that, "[h]e was in my way and he was asking what was happening, what was taking place . . ." (R. 16).

The testimony of the other witnesses both for the City and for Shuttlesworth does not vary substantially. Several witnesses testified that Shuttlesworth made the statement that he wanted to remain with the group (R. 20, 28, 41, 50). Shuttlesworth further testified that he never stood between the Chief and the group (R. 42). Another police officer testified that Shuttlesworth was standing alone when the Chief of Police made his announcement to the group and that "[h]e was there about the same place" when the arrest was made (R. 34). Another police officer testified that after the others were placed under arrest Shuttlesworth walked along with them toward the patrol wagon (R. 32) before he, too, was arrested and taken away in a police car.

Shuttlesworth was entirely peaceful. The Chief testified that, "he didn't put his hands on any one" (R. 16), and that he was not profane or loud (R. 17). His attitude was not

"pugnacious" (R. 22). He did not verbally refuse to leave but simply remained where he was (R. 27). Neither he nor the Chief raised his voice (R. 32). He did not resist arrest (R. 32), nor did he do anything to stop his friends from being arrested (R. 32).

There is nothing in the record to indicate why the Chief of Police wanted to place all of the other travellers under arrest for their protection but wanted Shuttlesworth to leave the station.

Shuttlesworth was tried and convicted of violating Section 856 of the General City Code of Birmingham in the Circuit Court of Jefferson County, Alabama on December 5, 1961 and was sentenced to pay a fine of $100 and costs (R. 7). On failure to pay the fine, he was sentenced to 52 days of hard labor (R. 8). He was sentenced to an additional term of 180 days of hard labor (R. 8), and 16 days for costs (R. 8).

The Court of Appeals of Alabama affirmed the conviction on October 23, 1962. The Court took notice of Shuttlesworth's argument that the Chief of Police was not in the discharge of any legal duties, but yet the argument "can avail the appellant nothing, because his conduct was also that prohibited by §825 of the City Code" dealing with the crime of assault (R. 60). The Court found no error in the conviction for interfering with the Police Chief since under its views of the evidence, petitioner "could have been clearly convicted of a simple assault" (R. 61). The Supreme Court of Alabama refused to review the conviction on the ground that the petition for certiorari had not been submitted on transcript paper, *infra*, p. 6a.

**How the Federal Questions Were Raised and Decided Below**

Petitioner filed a motion to quash and demurrer (R. 2-4) which alleged that "the allegations of the information or complaint, and each count thereof are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend" (R. 4) and that Section 856 of the City Code under which the complaint was brought violated the First and Fourteenth Amendments by denying rights of freedom of speech and assembly, liberty without due process of law, and equal protection of the laws; moreover, petitioner charged that the ordinance was so vague as to deny due process of law secured by the Fourteenth Amendment (R. 2-5).

At the close of the City's case (R. 38) and at the end of the trial (R. 52), a motion to exclude was filed alleging that petitioner was merely exercising rights secured by the First and Fourteenth Amendments (R. 6) and on the ground that there was no evidence to support a conviction (R. 6). All of petitioner's motions were overruled (R. 7, 11, 39, 52).

These allegations of constitutional rights were renewed in assignments of error on appeal to the Court of Appeals of Alabama (R. 56). That Court, without discussing the constitutional issues raised, affirmed the conviction (*infra*, 1a, R. 68). It did so by finding that petitioner's conduct amounted to an assault in violation of §825 of the Birmingham City Code.

A petition for certiorari was filed within the prescribed time in the Supreme Court of Alabama and it was denied on the ground that it was not submitted on transcript paper, *infra*, p. 6a.

## Reasons for Granting the Writ

The decision below conflicts with applicable decisions of this Court on important constitutional issues.

### I.

**Petitioner's Conviction Was Affirmed Under a Criminal Statute the Violation of Which Had Not Been Charged, Contrary to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.**

The disposition of this case by the Court of Appeals of Alabama was in direct conflict with the principals set down by this Court in *Cole* v. *Arkansas*, 333 U. S. 196. Petitioner was charged, tried, and convicted under a complaint which charged that he "did knowingly and wilfully interfere with, hinder, or prevent a police officer of the City of Birmingham; . . . in the discharge of his legal duty," and under an ordinance (§856 Birmingham City Code) which applies to "Any person who knowingly and wilfully opposes or resists an officer of the city in executing, or attempting to make any lawful arrest, or in the discharge of any legal duty . . .".

When petitioner urged to the Alabama Court of Appeals, as he does here, that there was no evidence to sustain a conviction under this charge and ordinance, it recognized the argument but held that his conviction was valid because "his conduct was also that prohibited by §825 of the City Code, which provides for the same degree of punishment as §856, §825 making it an offense against the City for any person to commit an assault" (*infra*, p. 2a, R. 60).

This holding flies in the face of *Cole* v. *Arkansas*, 333 U. S. 196, where the Court reversed a conviction in similar circumstances, stating that (333 U. S. at 201):

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. . . . It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *DeJonge* v. *Oregon*, 299 U. S. 353, 362."

It is submitted that here as in the *Cole* case, *supra*, petitioner was entitled to have his conviction appraised on the case as it was tried in the trial court, i.e., under Section 856, and not in terms of a statute never mentioned in the accusation or considered upon trial of the case.

## II.

**The Judgment Below Violates the Due Process Clause of the Fourteenth Amendment in That It Rests on No Evidence of Any Interference With an Officer Performing a Legal Duty.**

The Alabama Court of Appeals never faced the issue of whether there was evidence to support the charge under §856, i.e., interfering with an officer in the performance of a legal duty. Instead, it bypassed this question and held that petitioner was guilty of an assault under §825, under which Shuttlesworth was not at all charged. But putting aside for the moment that one cannot be convicted for a

charge not made, there was also no evidence upon which petitioner could have been convicted under §856. First, the officers were not in the performance of any legal duty. The persons who were placed in "protective custody" were "freedom riders" (R. 1B), whose right to be free from arrest and prosecution under circumstances like those disclosed in this record is well established in the law. *Taylor* v. *Louisiana*, 370 U. S. 154; *Boynton* v. *Virginia*, 364 U. S. 454. Arresting the riders to place them in "protective custody" cannot be any more valid than an arrest for "suspicion" or "investigation," *Henry* v. *United States*, 361 U. S. 98; cf. Justice Douglas, "Vagrancy and Arrest on Suspicion," 70 Yale Law J. 1, 12-13. In any event, the Alabama Court of Appeals referred to "protective custody" as "the receiving of someone who places himself voluntarily under the protection of a peace officer" (R. 60). There is no showing that that is what happened here. Consequently, assuming that Shuttlesworth "interfered," he was not interfering with the performance of a legal duty of any police officer.

But the record also demonstrates that he did not "interfere." At the time of his arrest Shuttlesworth was waiting along with others to board a bus to Montgomery, Alabama (R. 21, 36). The Chief decided to arrest the entire group except Shuttlesworth.

Any conviction of the petitioner had to result from his words or acts at the time of the arrests. But the evidence was that after the Chief announced that he was arresting the group, he told Shuttlesworth to leave the station (R. 13, 14). Shuttlesworth stated that whatever happened to the group should happen to him (R. 14). In the words of the Chief, "he was asking what was happening, what was taking place . . . " (R. 16). Shuttlesworth

was not disorderly (R. 17, 22) and both he and the Chief spoke quietly (R. 32).

There is testimony that while Shuttlesworth was talking to the Chief, he got between him and the other members of the group (R. 14, 20, 32), although there is evidence to the contrary (R. 34, 42). The police chief further testified that he told Shuttlesworth "to leave the bus station" (R. 14) and "to go—to get out of my way" (R. 14), and he remained where he was (R. 27, 29).

There is no evidence that petitioner through word or action prevented the Chief of Police from carrying out his duties. The evidence, taken in the light most unfavorable to the petitioner is that he stood between the chief of police and the group and did not leave the station when ordered. There is nothing unusual in a person standing face to face with another while talking to him. Nor was there any reason why Shuttlesworth, who had a ticket to Montgomery, Alabama (R. 25, 40), should have left the station. There is no evidence that petitioner's conduct in any way sought to prevent or prevented the police from arresting the other travelers. Neither the travelers nor the petitioner resisted arrest (R. 32).

Certiorari should be granted because it is a "violation of due process to convict and punish a man without evidence of his guilt." *Thompson* v. *Louisville*, 362 U. S. 199, 206; *Garner* v. *Louisiana*, 368 U. S. 157; *Taylor* v. *Louisiana*, 370 U. S. 154. Inquiring of a police officer as to what is happening to one's friends and refusing to leave a bus station where one has a right to be is no evidence of interference with a police officer in the performance of his duties. As the Court recently said, " . . . One cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." *Wright* v. *Georgia*, —— U. S. ——, 31 U. S. Law Week 4487, 4489.

## III.

### The Law Under Which Petitioner Was Convicted Is Unconstitutionally Vague as Applied to His Conduct.

No one reading Section 856, Birmingham City Code could know that it makes criminal remaining upon the premises of an interstate bus terminal while holding a ticket contrary to the orders of a police officer to depart. Nor could one be expected to know that this section makes criminal a response such as petitioner gave the policeman upon the order to depart, and upon the officer's arrest of petitioner's companions who similarly held tickets. The Alabama Court of Appeals apparently also was of the view that petitioner's conduct did not violate Section 856, for it, for the first time in the proceedings, was compelled to turn to Section 825 of the City Code which punishes assault to affirm the conviction.

Petitioner's conduct was amply protected by the decisions of this Court. He plainly had a right to remain in the bus terminal notwithstanding the officer's demand that he leave (*Boynton* v. *Virginia*, 364 U. S. 454; *Gayle* v. *Browder*, 352 U. S. 903; *Taylor* v. *Louisiana*, 370 U. S. 154; *Wright* v. *Georgia*, 31 U. S. Law Week 4487); he also had a right to protest the unlawful demand that he leave the terminal and the unlawful attempt to arrest his companions in "protective custody" (*Thompson* v. *Louisville*, 362 U. S. 199, 206; *Wright* v. *Georgia*, *supra*).

The Court below clearly indicated that there was no such thing as "protective custody" under Alabama law without the voluntary consent of one placed in such custody (R. 60). The peaceful inquiry into such an unlawful arrest of one's companions cannot be considered to be an unlawful interference with a policeman performing his

*legal duties*, for the ordinance plainly fails to warn that such conduct is criminal. Cf. *Thompson* v. *Louisville, supra*, 362 U. S. at 206, citing *Lanzetta* v. *New Jersey*, 306 U. S. 459. As this Court said in *Wright* v. *Georgia*, 31 U. S. Law Week 4487, 4489, " . . . a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute."

Certiorari should be granted for the additional reason that the ordinance which Shuttlesworth was convicted of violating is unconstitutionally vague as applied and that due process of law does not permit an appellate court to convict a person of a crime not charged.

## IV.

**The Fact That the Supreme Court of Alabama Refused to Review Petitioner's Conviction Because His Petition for Certiorari Was Not Filed on "Transcript Paper" Should Not Preclude a Review by This Court of the Substantial Federal Questions Involved.**

The fact that certiorari was denied by the Supreme Court of Alabama because review was sought of the Court of Appeals judgment on paper of the wrong size does not preclude review here. The petition for writ of certiorari was filed on ordinary legal cap (8½ x 14 inches) (See R. 63), rather than on Alabama transcript paper (10½ x 16 inches in size) as set forth in Alabama Supreme Court Rule 32. Under Alabama practice in preparing records, legal cap is in some cases used and stapled to the larger size paper. This was done by the Clerk of the Court below with the opinions of the Court of Appeals and the Supreme Court

in preparing this record (R. 59, 68). And under Alabama practice a petition for rehearing need not be filed on the transcript or folio paper. *Redwine* v. *State,* 36 Ala. App. 560, 61 So. 2d 715. Nevertheless, Alabama has the formalistic requirement, which it has frequently enforced (see cases cited in opinion below, R. 68), that such petitions for certiorari must be on the transcript paper under its Rule 32. The State Supreme Court, however, has not been entirely inflexible in regard to this rule. On at least one occasion the Court has proceeded to a consideration of the merits of a case despite the failure to file on transcript paper within the allotted time. In *Houston* v. *State,* 265 Ala. 588, 93 So. 2d 439, the Court said:

> "Subsequent to submission, appellant became aware that the petition was not on transcript paper and requested leave to remedy this defect. In view of this request, we have considered the petition on its merits and find no reason to reverse the judgment of the Court of Appeals. The writ would have been denied had the application not been stricken.
>
> "Petition for writ of certiorari stricken."

While *Houston* v. *State, supra,* is apparently an exceptional case under Alabama law (cf. *Jemison* v. *Alabama,* 270 Ala. 589, 120 So. 2d 751), it nevertheless demonstrates the power of the Supreme Court of Alabama to look at and decide the merits of a case notwithstanding the litigant's failure to use transcript paper. Thus, this is a case where the Court had discretion to review the judgment and refused to exercise it.

In *Williams* v. *Georgia,* 349 U. S. 375, this Court faced a similar problem and ruled that where "the trial court and the state Supreme Court declined to grant Williams' motion though possessed of power to do so under state law . . . [where the] motion was based upon a constitu-

tional objection, and one the validity of which has in principle been sustained here, the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us" (349 U. S. at 389).

This case further resembles *Williams* v. *Georgia, supra,* in that subsequent to the proceedings below this Court decided *Wright* v. *Georgia, supra,* which conclusively vindicates petitioner's constitutional claims. See also *Patterson* v. *Alabama,* 294 U. S. 600.

A further compelling reason why review in this Court should not be precluded by Alabama's formalistic requirement, which it could have waived, is that this petition seeks a writ of certiorari to the Alabama Court of Appeals and not to the Supreme Court of Alabama. The judgment of the Court of Appeals was on the merits and was not based upon any claimed failure to comply with state procedural requirements. When certiorari is denied by the Alabama Supreme Court, this Court reviews the judgment of the Court of Appeals, the highest court to which an appeal may be taken as a matter of right. *Shuttlesworth* v. *Birmingham,* 31 U. S. Law Week 4481; *Gober* v. *Birmingham,* 31 U. S. Law Week 3385; *Anderson* v. *Alabama,* 364 U. S. 877. Certainly this Court, which could and has reviewed where the Alabama Supreme Court has given no reason for denying certiorari, also can review when the reason given is as much a matter of ritual and form (cf. *Staub* v. *Baxley,* 355 U. S. 313) as the reason given here. "[A]ssertion of federal rights, when plainly and reasonably made is not to be defeated under the name of local practice." *Davis* v. *Wechsler,* 269 U. S. 22, 24.

## CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
GEORGE B. SMITH
10 Columbus Circle
New York 19, New York

PETER A. HALL
ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue, North
Birmingham, Alabama

*Attorneys for Petitioner*

# APPENDIX

# APPENDIX

## Opinion of the Alabama Court of Appeals

THE ALABAMA COURT OF APPEALS

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

OCTOBER TERM, 1962-63

6 Div. 856

---

FRED L. SHUTTLESWORTH

v.

CITY OF BIRMINGHAM

---

Appeal from Jefferson Circuit Court

---

CATES, *Judge*

Shuttlesworth was found guilty under §856 of the City Code of Birmingham for interfering with the chief of police in the latter's taking certain Freedom Riders into "protective custody."

Taking into protective custody we consider to mean the receiving of some one who places himself voluntarily under the protection of a peace officer.

Outside the bus station was a crowd of some 250 to 300 shouting for the police to give way, to let them take care of the Freedom Riders en route to Montgomery who, on the walkout of bus drivers, were stranded in Birmingham. The crowd was trying to press forward toward the bus loading platform. Streets were blocked—Nineteenth entirely; Seventh Avenue between Eighteenth and Nineteenth.

Shuttlesworth has argued to us that the chief of police was not in the discharge of any legal duty. *Harris* v. *Tuscaloosa*, 21 Ala. App. 392, 108 So. 768, does not apply here; nor are *People* v. *Papp*, 185 N. Y. S. 2d 907, and *White* v. *Edmunds* [1790], Peake 123, in point.

This argument can avail the appellant nothing, because his conduct was also that prohibited by §825 of the City Code which provides for the same degree of punishment as §856, §825 making it an offense against the City for any person to commit an assault.[1] *Andersen* v. *United States*, D. C. Mun. App., 132 A. 2d 155; affirmed 253 F. 2d 335. See *Duncan* v. *Jones* [1936], 1 K. B. 218.

The definition of assault is well known from the common law. In *Kennedy* v. *State*, 39 Ala. App. 676, 107 So. 2d 913, we had occasion to consider some of the elements of resisting arrest.

There may be a species of resisting an officer without at the same time committing an assault. Cf. *Dist. Col.* v.

---

[1] § 825 reads: "Any person who commits an assault, or an assault and battery, upon another person, shall, on conviction, be punished as provided in section 4."

§ 856 reads: "Any person who knowingly and wilfully opposes or resists any officer of the city in executing, or attempting to make any lawful arrest, or in the discharge of any legal duty, or who in any way interferes with, hinders or prevents, or offers or endeavors to interfere with, hinder or prevent such officer from discharging his duty, shall, on conviction, be punished as provided in section 4."

§ 208 reads: "The chief of police or any policeman of the city has authority and it is his duty to make arrests for offenses against the laws of the state in all cases where such authority is now or shall hereafter be conferred on such officers by the laws of the state, and in making such arrests, whether with or without a warrant, they shall have all the authority conferred, and be subject to all the duties imposed upon such officer, by the laws of Alabama, in existence now or that may hereafter be enacted."

*Little*, 339 U. S. 1; *Innes* v. *Wylie* [1844], 1 Car. & Kir. 257; *Patterson* v. *Sylacauga*, 40 Ala. App. 239, 111 So. 2d 25. But under the wording of §856 opposing or interfering or hindering are alternatives to resistance, so that it is our view that an assault is an offense included in §856 in the alternative here pertinent.

Inasmuch as Shuttlesworth blocked the chief's path using words from which the intent to do so "in rudeness or in anger" could probably and rationally be inferred, there was no error in his conviction, since he could have been clearly convicted of a simple assault. The judgment below is due to be

AFFIRMED.

Price, P. J., and Johnson, J., concur in result.

## Order and Judgment of the Alabama Court of Appeals

THE ALABAMA COURT OF APPEALS

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

OCTOBER TERM, 1962-63

6 Div. 856

[SAME TITLE]

February 8, 1962—TRANSCRIPT FILED

May 3, 1962

Come the parties by attorneys, and submit this cause on briefs for decision.

October , 1962

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

## Order of Denial of Rehearing

THE ALABAMA COURT OF APPEALS

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

OCTOBER TERM, 1962-63

6 Div. 856

[SAME TITLE]

November 20, 1962

It is ordered that the application be and the same is hereby overruled.

Per Curiam.

## Opinion of the Supreme Court of Alabama

THE SUPREME COURT OF ALABAMA

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

OCTOBER TERM, 1962-63

6 Div. 940

[SAME TITLE]

Petition for Writ of Certiorari to Court of Appeals

MERRILL, *Justice.*

The petition for certiorari to the Court of Appeals must be stricken because it is not on transcript paper. Supreme Court Rule 32; *Ex parte Cranmore,* 129 So. 2d 688; *Ex parte Davis,* 269 Ala. 58, 110 So. 2d 306; *Accardo* v. *State,* 268 Ala. 293, 105 So. 2d 865; *McDonald* v. *Amason,* 267 Ala. 654, 104 So. 2d 719; *Ladd* v. *State,* 266 Ala. 586, 98 So. 2d 59.

PETITION FOR WRIT OF CERTIORARI STRICKEN.

Livingston, C. J., Simpson and Harwood, JJ., concur.

## Orders of the Supreme Court of Alabama

THE SUPREME COURT OF ALABAMA

6th Div. 940

[SAME TITLE]

THURSDAY, DECEMBER 20, 1962

THE COURT MET PURSUANT TO ADJOURNMENT

PRESENT: ALL THE JUSTICES

PETITION FOR CERTIORARI TO THE COURT OF APPEALS

(Re: Fred L. Shuttlesworth vs. City of Birmingham)

Jefferson Circuit Court No. 22506

Comes the Petitioner and the petition for Writ of Certiorari to the Court of Appeals being submitted on briefs and duly examined and understood by the Court,

IT IS CONSIDERED AND ORDERED that the petition is hereby stricken at the cost of Petitioner for which costs let execution issue.

Opinion by Merrill, J.

Livingston, C. J., Simpson and Harwood, JJ., concur.

# THE SUPREME COURT OF ALABAMA

6th Div. 940

[SAME TITLE]

THURSDAY, FEBRUARY 28, 1963

PRESENT: ALL THE JUSTICES

PETITION FOR CERTIORARI TO COURT OF APPEALS

(Re: Fred L. Shuttlesworth vs. City of Birmingham)

Jefferson Circuit Court

IT IS ORDERED, that the application for rehearing filed on January 4, 1963, be and the same is hereby overruled.

No Opinion Written on Rehearing.

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FILED
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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. [redacted] 168

FRED L. SHUTTLESWORTH,
Petitioner,
vs.
CITY OF BIRMINGHAM.

## BRIEF AND ARGUMENT

Of Respondent City of Birmingham in Opposition to Petition for Writ of Certiorari to the Court of Appeals of Alabama.

J. M. BRECKENRIDGE,
600 City Hall Building,
Birmingham 3, Alabama,
Attorney for Respondent,
City of Birmingham.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 1140.

FRED L. SHUTTLESWORTH,
Petitioner,

vs.

CITY OF BIRMINGHAM.

## BRIEF AND ARGUMENT

**Of Respondent City of Birmingham in Opposition to Petition for Writ of Certiorari to the Court of Appeals of Alabama.**

### JURISDICTION.

Under the heading "Jurisdiction" the Petitioner says that the jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257 (3), "petitioner having asserted below, and claiming here, deprivation of rights, privileges and immunities secured by the Constitution of the United States". However, this claim of Petitioner is not shown by the Record. In fact, the Record is clear that the Petitioner did not raise any issue whatso-

ever, constitutional or otherwise, before the Supreme Court of Alabama. Petitioner has ignored the requirements to obtain a review of his case before the Supreme Court of Alabama. Petitioner completely ignored Alabama Supreme Court Rule 32, which provides that the petition for certiorari to the Court of Appeals be stricken if it is not on transcript paper.

## CITATIONS AND ARGUMENT RELATING TO THE JURISDICTION OF THIS COURT TO ENTERTAIN CERTIORARI IN THIS CASE.

The Supreme Court of Alabama has consistently ordered stricken every application for certiorari to the Court of Appeals of Alabama which was not submitted on transcript paper as mandatorily required by Supreme Court Rule 32. The Petitioner chose to ignore this rule and thereby has not presented to the Supreme Court of Alabama in the manner prescribed by its rules the alleged constitutional questions which he is attempting to present to this Court.

The Opinions of the Supreme Court of Alabama wherein petitions for certiorari to the Court of Appeals of Alabama were stricken because such petitions were not on transcript paper are too numerous to mention. A few of such cases are the following: **Stovall v. State**, 257 Ala. 116, 57 So. 2d 641; **Duckett v. State**, 257 Ala. 589, 60 So. 2d 357; **Smith v. State**, 264 Ala. 264, 86 So. 2d 842; **Ladd v. State**, 266 Ala. 586, 98 So. 2d 59; **McDonald v. Amason**, 267 Ala. 654, 104 So. 2d 719; **Accardo v. State**, 268 Ala. 293, 105 So. 2d 865; **Ex parte Davis**, 269 Ala. 58, 110 So. 2d 306; **Ex Parte Cranmore**, 273 Ala. 4, 129 So. 2d 688.

This Court has held that the law of practice of a State must be complied with in order to properly bring constitutional questions to this Court. An orderly method for judicial review of this Court could reasonably require no less. This Court has recognized this and has so held.

The rule in this regard is stated in **John v. Paullin**, 231 U. S. 583, 34 S. Ct. 178, 179, 58 L. Ed. 381:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, and the law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. Calian v. Bransford, 139 U. S. 197, 35 L. Ed. 144, 11 Sup. Ct. Rep. 519; Brown v. Massachusetts, 144 U. S. 573, 36 L. Ed. 546, 12 Sup. Ct. Rep. 757; Jacobi v. Alabama, 187 U. S. 133, 47 L. Ed. 106, 23 Sup. Ct. Rep.; Halbert v. Chicago, 202 U. S. 275, 281, 50 L. Ed. 1026, 26 Sup. Ct. Rep. 617; Newman v. Gates, 204 U. S. 89, 51 L. Ed. 385, 27 Sup. Ct. Rep. 220; Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191, 195, 53 L. Ed. 963, 965, 29 Sup. Ct. Rep. 546."

It has long been settled that the Supreme Court acquires no jurisdiction to review the judgment of a State court of last resort unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court of last resort. **Whitney v. People of State of California**, 274 U. S. 357, 47 Sup. Ct. 641.

It is also fully settled that where a constitutional question is not properly presented to the State Appellate Court of last resort, and for this reason, under state practice, is not decided or passed upon by such Court of last resort, the question is not before the Supreme Court on certiorari to the State court. **Barbour v. State of Georgia**, 249 U. S. 454, 39 S. Ct. 316, 317; **Louisville & Nashville Railroad Company v. Woodford**, 234 U. S. 46, 34 S. Ct. 739, 741;

**Taylor v. City of Birmingham**, 35 Ala. App. 133, 45 So. 2d 53, **cert. den.**, 253 Ala. 369, 45 So. 2d 60, **cert. den.**, 340 U. S. 832, 71 S. Ct. 45; **Michel v. State of Louisiana**, 340 U. S. 832, 71 S. Ct. 45.

It is therefore respectfully suggested that Petitioner's failure to comply with procedural requirements necessary to obtain a decision of the Supreme Court of Alabama on the alleged constitutional issues he raises before this Court is sufficient without more to deny certiorari in this case.

## FACTS RELATING TO THE ARREST OF PETITIONER.

At the time the Petitioner was arrested there was a large crowd in and around the bus station (R. 14, 17, 18, 26, 34, 35). Captain Jack A. Warren estimated the size of the crowd to be approximately 250 or 300 persons (R. 29). The crowd was in a boisterous and jeering mood and some of the crowd yelled out, "Take the police away and we will take care of it" (R. 14). Other witnesses also testified as to the dangerous emotion of the crowd or mob. Captain James W. Garrison testified things were tense at the bus station (R. 24), and he felt the Freedom Riders were in danger actually of their lives (R. 24). The attitude was belligerent, storming, and overall anger (R. 26), and it was directed toward the Freedom Riders (R. 26). Captain Jack A. Warren testified there was a great deal of tension at the bus station (R. 29, 30): "You could see it in the faces of the people in the crowd, you could tell it in the talking to themselves and their muttering and trying to press forward toward the bus loading platform. I was very much aware of that. As a matter of fact, that is the reason I was there" (R. 29, 30). Officer T. T. Trammell testified there was a lot of unrest at the station and it seemed like everything could erupt in one fast moment (R. 35).

At the time of Petitioner's arrest there were 30 or 35 or maybe 40 policemen at the bus station, and during the week approximately 80 per cent of the entire police force was engaged at the bus station at one time or another (R. 26). The duties of these officers were described by Captain James W. Garrison as follows: "Well, we had some officers that stayed right with these Freedom Riders all the time. We had others that was assigned to keep back the crowds. We had others to work traffic at the different intersections. We had 19th Street blocked entirely and had 7th Avenue blocked between 18th and 19th Streets to avoid cars just continuing in a circle. And some were inside the bus station and stayed in the waiting room the entire time" (R. 26, 27).

The Freedom Riders were unable to get a driver to drive the bus (R. 26, 40).

**The conduct of the Petitioner hindered or interfered with Chief Jamie Moore when he was placing the Freedom Riders in protective custody** (R. 24, 28).

Chief Moore told the Freedom Riders who he was, i. e., Chief of Police of the City of Birmingham, and that he was taking them into protective custody due to the circumstances at the bus station (R. 13, 14, 15, 20).

Chief Moore told the Petitioner to leave the bus station, that he was not concerned with what was happening, but the Petitioner did not leave but got between Chief Moore and the Freedom Riders and would not leave on order.

Captain James W. Garrison also told the Petitioner to move on, and the Petitioner continued to interfere (R. 20).

The Petitioner knew Chief Moore and his capacity with the City (R. 43, 44).

The Petitioner was a resident of the City. The substance of the record clearly shows that at the time the

freedom riders were taken into protective custody for their own protection the Police believed all of them to be non-residents passing through the City of Birmingham en route to Montgomery, Alabama, and that they were marooned in the Bus Depot. The police knew the Petitioner to be a local man and that he did not come into the City with the freedom riders.

The presence of the freedom riders in Birmingham at that time (only a few days after a bus had been burned on the highway), the refusal of bus drivers to take out any bus on which they rode, the crowd or mob gathered around the bus station, the coming of night time presented a grave crisis. The issue of law and order was paramount. The record in this case is completely devoid of any protest, objection or resistance of the freedom riders to being taken into protective custody. The action of the police in furnishing the freedom riders with a safe place of refuge probably saved some of their lives, as well as the lives of others, and the record indicates they accepted this safe place of refuge without objection.

The Police acted to maintain law and order. The Police acted on facts which were apparent to them. The Police are not constitutional lawyers and should not be. They acted in a practical manner. Their actions were not objected to by the freedom riders. The Petitioner hindered or interfered with the action of the Police in removing the freedom riders from the scene, which removal was necessary in the judgment of the Police to prevent a riot. The action of the Police was successful. Their action prevented serious injury or loss of life. They are to be commended. The Petitioner did wilfully interfere with the police officer in maintaining law and order. There was nothing vague about the charge. The complaint (R. 1-B) specifically spelled out the manner in which he did interfere with the Chief of Police as follows:

". . . said defendant did knowingly and wilfully place himself between said officer and a group of people commonly called 'freedom riders' when said people were being placed in protective custody by said officer, and said defendant did knowingly and wilfully refuse to move out of the way of said police officer after being so ordered, contrary to and in violation of Section 856 of the General City Code of Birmingham of 1944."

The evidence sustaining the charge above set out is clear from the record. The Petitioner was convicted as charged. The Court of Appeals affirmed the judgment of the trial court. The Petitioner was not convicted of a violation of Section 825 of the City Code dealing with the crime of Assault. Although some reference to said Section 825 appears in the opinion of the Court of Appeals, the majority of the Judges concurred "in the result" and affirmed the judgment of the lower court, which judgment constituted a conviction for a violation of Section 856 of the City Code as charged in the complaint.

Lest there be some doubt that the Chief of Police was "in the discharge of a legal duty", this Court is respectfully referred to Section 910 of the General Code of the City of Birmingham of 1944, which provides, in part, as follows:

"Sec. 910. Functions of Department.

(a) General. The Police Department shall be charged with the preservation of the peace and order of the city, the protection of all persons and property within the city, and the enforcement of all criminal ordinances and all criminal laws of the city and the state. The department shall suppress all riots, disturbances and breaches of the peace, etc."

We respectfully submit that the reasonable actions of the Chief of Police of a City taken with a view of preventing an imminent riot was in the discharge of legal duties of such officer. If law and order in this County, both North and South, is to be maintained, the authority of the Police in situations such as is shown by this record should be affirmed.

It is therefore requested that the Petition for Writ of Certiorari to the Court of Appeals of Alabama in this case be denied.

Respectfully submitted,

J. M. Breckenridge

J. M. BRECKENRIDGE,
600 City Hall Building,
Birmingham 3, Alabama,
Attorney for Respondent,
City of Birmingham.

**Certificate of Service.**

This is to certify that I have this 25th day of June, 1963, served copies of the above and foregoing brief upon Jack Greenberg, James M. Nabrit III, and George B. Smith, 10 Columbus Circle, New York 19, New York, and Peter A. Hall and Orzell Billingsley, Jr., 1630 Fourth Avenue North, Birmingham, Alabama; all attorneys for the Petitioner, by depositing copies addressed to them at their respective offices as set out above in the United States Mail, postage prepaid.

J. M. Breckenridge

J. M. Breckenridge,
Attorney for Respondent,
City of Birmingham.

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IN THE

# Supreme Court of the United States

October Term, 1963

No. 168

FRED L. SHUTTLESWORTH,

*Petitioner,*

—v.—

CITY OF BIRMINGHAM.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

## PETITIONER'S BRIEF

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York 19, New York

PETER A. HALL
ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue, North
Birmingham, Alabama

*Attorneys for Petitioner*

*Of Counsel:*

MICHAEL MELTSNER
GEORGE B. SMITH

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IN THE

# Supreme Court of the United States

October Term, 1963

No. 168

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FRED L. SHUTTLESWORTH,

*Petitioner,*

—v.—

CITY OF BIRMINGHAM.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

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## PETITIONER'S BRIEF

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### Opinions Below

The opinion of the Court of Appeals of Alabama (R. 59-60) is reported at 149 So. 2d 921. The opinion of the Supreme Court of Alabama (R. 65) is reported at 149 So. 2d 923.

### Jurisdiction

The judgment of the Court of Appeals of Alabama (R. 58) was entered on October 23, 1962. An order overruling an application for rehearing in that court was entered November 20, 1962 (R. 61). A petition for writ of certiorari filed in the Supreme Court of Alabama was stricken on December 20, 1962 (R. 67) and an application for rehearing in that court was overruled February 28, 1963 (R. 67). The jurisdiction of this Court rests on 28 United States Code, Section 1257(3), petitioner having asserted below and claiming here the deprivation of rights, privileges and

immunities secured by the Constitution of the United States. The petition for certiorari in this Court was filed May 29, 1963, and certiorari was granted October 14, 1963 (R. 68).

**Constitutional and Statutory Provisions Involved**

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 856 of the General City Code of Birmingham.

> "Any person who knowingly and wilfully opposes or resists any officer of the city in executing, or attempting to make any lawful arrest, or in the discharge of any legal duty, or who in any way interferes with, hinders or prevents, or offers, or endeavors to interfere with, hinder or prevent such officer from discharging his duty, shall, on conviction be punished as provided in section 4." *

3. This case also involves Section 825 of the General City Code of Birmingham.

> "Any person who commits an assault, or an assault and battery, upon another person, shall, on conviction, be punished as provided in section 4."

4. This case also involves Rule 32 of the Revised Rules of Practice in the Supreme Court of Alabama (Code of Alabama, 1958, Appendix to Title 7, p. 1172).

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* Section 4 of the City Code provides, *inter alia*, for punishment "by a fine not exceeding one hundred dollars, or by imprisonment in the city jail, workhouse or house of correction or at hard labor upon the streets or public works for not exceeding six months, or by both such fine and imprisonment. . . ."

"Rule 32. *Paper of Applications for Bail, Mandamus, etc., Must Correspond with Transcript.*

All applications to this court to admit bail, or for the writ of habeas corpus, mandamus, or other writ or process depending on motion of this court, together with all papers and proceedings touching the same, shall be presented on folio paper, of the pattern now required by the rule for ordinary transcripts, so that the same may be in suitable form for binding; and no application shall be heard that is not so presented."

## Questions Presented

1. Whether petitioner was denied due process of law by his conviction on a record devoid of any evidence of guilt?

2. Whether petitioner was denied due process in that he was convicted under a law which failed to give fair warning that his conduct was prohibited?

3. Whether petitioner was denied due process of law when he was charged, tried and convicted under a law prohibiting interfering with a police officer, but the conviction was affirmed on appeal, on the ground that he had committed another crime for which the same sentence might be imposed, i.e., assault, even though there had been no accusation or trial on the issue of assault?

4. Whether there is an adequate non-federal ground which precludes review in this Court where the Alabama Court of Appeals ruled against petitioner on the merits, but the Alabama Supreme Court struck a petition for writ of certiorari that sought to invoke its discretionary jurisdiction on the ground that the petition was on the wrong size paper?

## Statement of the Case

Petitioner, Reverend Fred L. Shuttlesworth, was arrested May 17, 1961, at the Greyhound Bus Station in Birmingham, Alabama, and charged with violating Section 856, General City Code of Birmingham of 1944. The complaint filed against him in the Circuit Court of the Tenth Judicial Circuit of Alabama[1] charged that he (R. 4):

> . . . did knowingly and wilfully interfere with, hinder, or prevent a police officer of the City of Birmingham; namely, Jamie Moore, Police Chief for the City of Birmingham, in the discharge of his legal duty in that said defendant did knowingly and wilfully place himself between said officers and a group of people commonly called "freedom riders" when said people were being placed in protective custody by said officer, and said defendant did knowingly and wilfully refuse to move out of the way of said police officer after being so ordered, contrary to and in violation of Section 856 of the General City Code of Birmingham of 1944.

On the day in question, Reverend Shuttlesworth, pastor of a Birmingham church and a well known civil rights leader there (R. 46-47), went to the bus station with a group of persons referred to in testimony as "freedom riders." The group, eighteen or more persons, including petitioner, had tickets for bus travel to Montgomery, Alabama, and arrived at the terminal between two and three o'clock in the afternoon. A crowd had gathered in nearby streets and about thirty to forty police officers were on duty in the area (R. 28-29). Police Captain Garrison said that the

[1] Petitioner was originally charged and convicted of the same offense in the Recorder's Court of the City of Birmingham. He was sentenced to pay $100 fine and to perform hard labor for 180 days in that court. Upon posting an appeal bond (R. 3), he obtained a trial *de novo* in the Circuit Court.

crowd had a "belligerent" attitude directed at the freedom riders (R. 29), and he thought their lives were in danger (R. 27). The police checked to see that all persons in the station were passengers with tickets (R. 25, 28). Shuttlesworth and his group had difficulty in getting transportation when a driver refused to drive a bus scheduled to leave between two and three o'clock (R. 43, 29); the group decided to wait for the next bus (R. 43).

At approximately four o'clock Birmingham Police Chief Jamie Moore went to the station and approached the group on a loading platform. He said: ". . . I went out and told that group of people in a voice loud enough to be heard who I was, I identified myself, and told them that due to the circumstances that day that I as Chief of Police was arresting them and taking them into protective custody of the City of Birmingham" (R. 15). According to the Chief, Shuttlesworth, who had been at a pay phone, "came on out there about the time that I was talking to those people" (R. 16). Then, in the Chief's words (R. 16):

> Well, he [Shuttlesworth] walked around to my left right close to me and got eventually between—I say eventually, it wasn't a lot of time there, and I told him to leave the bus station. I called him by his name, I called him Fred, that he was not concerned with what was happening there, and he walked around and then got between me and some of those people I was talking to and I believe I asked him to go—to get out of my way, and he said, if those people have to be arrested, why, he wanted to be arrested also.

The Chief then ordered that petitioner be taken into custody. On cross-examination Chief Moore gave some slight additional detail. He said that Shuttlesworth was two or three feet away from him, that he spoke to Shuttlesworth first, that petitioner did not put his hands on anyone, and

was not profane or loud (R. 18-19). Chief Moore testified (R. 18):

> A. I told him, "Fred—" I called him Fred—I said, "You are not concerned in this. We are engaged in business," or words to that effect. "You get out of my way and don't bother us."
>
> Q. Well, now, what occasioned you to speak to him at that time? A. He was in my way and he was asking what was happening, what was taking place, and I had already announced to those people in a good loud clear voice who I was and my intention.
>
> Q. Now, did he do anything other than ask those questions as to what was happening? A. He walked around to my left and was between me and some of those people.
>
> Q. Did he do any other act? A. Your Honor, I would like for him to ask specifically, if he will, what he has in mind there.
>
> Q. Did he do any physical act? Did he put his hands on anyone? Did he do anything other than ask the questions and walk around to your left? A. He didn't put his hands on anyone that I saw, if that is what you are talking about.
>
> Q. Was he profane, Chief, or loud? A. He wasn't.
>
> Q. Or argumentative? A. He was not profane.
>
> Q. Was he loud and argumentative while talking to you? A. I wouldn't say he was loud.

It may be noted that there was no statement that Shuttlesworth blocked the Chief's path or that the Chief was trying to walk anywhere; the Chief merely said that petitioner "walked around and got between me and some of the people I was talking to" (R. 16), and that "he was in my way and he was asking what was happening, what was taking place" (R. 18-19).

The entire group was arrested without resistance (R. 26) and taken to the City Jail,[2] but no charge was made against any member of the group except Shuttlesworth (R. 19, 54); the rest of the group finally got a bus to Montgomery the following Saturday (R. 23).

The testimony of police Captain Garrison who was standing with Chief Moore at the time of the arrest was substantially the same as the Chief's. On cross, Captain Garrison was asked (R. 25):

> Q. Did he at any time exhibit any pugnacious attitude? Did he put his hands on anyone or offer any argument? A. Not verbally, but he didn't move.
>
> Q. But he asked what was going on and he didn't move? A. To the best of my recollection he asked what was going on and he did make the one statement that if they were placed in jail he wanted to go too.

Another officer, Captain Warren, described the incident in similar fashion,[3] stating that neither the Chief nor the petitioner raised his voice in speaking to the other (R. 35).

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[2] One member of the group said that she was confined in the City Jail for 12 hours before she was released without being charged (R. 54).

[3] Captain Warren testified (R. 34):

"A. The conversation, such as it was that took place between Chief Moore and the Reverend Shuttlesworth was at the forefront of the group of Freedom Riders. The Chief was at the front of them at the bus and the Reverend Shuttlesworth was there and the Chief endeavored then after he placed them under protective custody to get them down the ramp toward the waiting patrol wagon, and the Reverend Shuttlesworth was in between the Chief and the Freedom Riders going along with them after having been asked not to interfere.

Q. So, he was going along with them down the ramp? A. That is correct.

Q. Towards the waiting patrol wagon? A. In that general direction, yes."

Police officer Trammell testified that when the Chief addressed the group Shuttlesworth "wanted to know why they were being placed under protective custody" (R. 36); he heard the Chief ask him to move out of the way but did not recall whether petitioner did move (R. 37). He said that the group was standing at a bus stall, apparently about to board a bus, when the Chief came up; and that he arrested petitioner on instructions of his superior officer (R. 40).

Shuttlesworth testified that he was with the group when Chief Moore walked up to them. His version of the conversation was as follows (R. 43-44):

> A. He identified himself and said, "I am Chief Moore," or words to that effect, Chief of the Birmingham City Police, and we have decided to arrest you all for your own protection."
>
> And I asked him what did he say, and he said he decided to arrest us for our own protection. And then he recognized me in the crowd and he said, "Shuttlesworth, are you with the group?"
>
> I said, "I am. We have been trying to get the bus out for two hours or more."
>
> And he said, "Well, you go on, I don't want any trouble out of you."
>
> And I said, "I am with the group and I want to catch a bus." And he said, "If you don't go on, I will have to arrest you." And I said, "Well, whatever happens on all them will happen to me; we are all together."
>
> So, he asked—I don't know—one of the officers to arrest me, and they took me in the patrol car and the rest of them in the wagon. We all started off about the same time.

Testimony by defense witness Vera Brown was similar (R. 53-54).

In short, all the witnesses agreed that petitioner was entirely peaceful in his conduct and in his language; that he did nothing to resist arrest or to stop his companions from being arrested; and that he merely inquired why they were being arrested and asked that he be treated as his companions were. Neither the Chief nor any of the other officers gave any indication why it was desired to arrest each member of the group of freedom riders except Shuttlesworth, and place them under "protective custody."

On December 5, 1961, petitioner was tried before the Circuit Court sitting without a jury and found "guilty as charged in the complaint" (R. 10). The trial court rendered no opinion. Shuttlesworth was sentenced to 180 days at hard labor and a $100 fine and costs. In default of payment of the fine and costs he is to serve additional 52 day and 16 day periods at hard labor (R. 10-11).

Prior to, during, and after the trial petitioner made appropriate motions objecting to the ordinance, the complaint, and the conviction on Fourteenth Amendment grounds (Motion to Quash, R. 5-6; Demurrers, R. 7-8; Motion to Exclude, R. 8-9); each of the motions was overruled (R. 9-10, 13, 42, 55). On appeal to the Court of Appeals of Alabama, petitioner assigned as errors the overruling of the motions mentioned above (R. 56). The Court of Appeals affirmed in a brief opinion (R. 59-60), in which it described "protective custody" as "the receiving of someone who places himself voluntarily under the protection of a peace officer." The Court mentioned petitioner's argument that the Chief was not acting in the discharge of any legal duty but said that this argument "can avail the appellant nothing, because his conduct was also that prohibited by §825 of the City Code which provides for the same degree of punishment as §856, §825 making it an offense against the City for any person to commit an assault" (R. 60).

The Court referred to the common law definition of assault, and said that "it is our view that an assault is an offense included in §856 in the alternative here pertinent" (R. 60). The Court then concluded (R. 60):

> Inasmuch as Shuttlesworth blocked the chief's path using words from which the intent to do so "in rudeness or in anger" could probably and rationally be inferred, there was no error in his conviction, since he could have been clearly convicted of a simple assault.

After the Court of Appeals denied rehearing (R. 61), Shuttlesworth petitioned the Supreme Court of Alabama to grant a writ of certiorari (R. 62-64), and filed a brief to which the City filed a reply brief likewise addressed to the merits of the case. The Supreme Court of Alabama, however, ordered that the petition for certiorari be stricken because it was not filed on "transcript paper" as required by that court's Rule 32 (R. 65), and denied rehearing (R. 66).

## Summary of Argument

Petitioner was denied due process of law secured by the Fourteenth Amendment in that he was convicted of crime without evidence of guilt. He was charged with interfering with an officer in the exercise of his legal duty. The police, however, were not exercising any legal duty when they took freedom riders into "protective custody." There appears to have been no such concept as "protective custody" in Alabama law, prior to petitioner's arrest, but as defined by the Alabama Court of Appeals, such custody contemplates a voluntary surrender, which did not occur here. In fact, the police illegally arrested freedom riders in the exercise of federally protected rights. But beyond this, petitioner did not, in fact, "interfere" with the police in

whatever it was they were doing. He was merely politely and quietly inquiring concerning their treatment of his companions.

That petitioner was not guilty of "interfering" may be discerned from the fact that the Court of Appeals evaded passing on the validity of the conviction for *that* offense, but affirmed by holding petitioner guilty of the crime of *assault*, which is punishable by the same penalty as interfering. But neither was there evidence of "assault." The Alabama law of assault has heretofore involved some element of violence as indicated by the cases cited below. There was, however, no violence here. Petitioner was held to have committed an assault because he spoke in "rudeness and anger," but neither is there any evidence that this occurred.

Moreover, the ordinances under which petitioner was charged and convicted are unconstitutionally vague as applied to his situation. Neither the ordinance dealing with interfering with a police officer, not that forbidding assault gives any notice that mere inquiry of a police officer as to why he is arresting one's companions in the lawful exercise of their rights as bus passengers constitutes either the crime for which petitioner was originally convicted or the crime for which he was held guilty in the Court of Appeals.

The conviction below also should be reversed because it was affirmed under an ordinance, the violation of which had not been charged, contrary to the due process clause of the Fourteenth Amendment. Petitioner was charged with interfering with the police officer but the conviction was affirmed on the ground that he had committed an assault. *Cole* v. *Arkansas*, 333 U. S. 196, holds that it is as much a violation of due process to send an accused to prison following a conviction of a charge on which he was never tried

as it would be to convict him upon a charge that was never made. *Cole* is directly in point.

This Court has jurisdiction to review the cause notwithstanding refusal by the Supreme Court of Alabama to review for the reason that the petition filed with it was not on transcript paper. Certiorari in this case properly runs to the Alabama Court of Appeals, the appellate court below the State Supreme Court, and the highest court of the state in which a review of right could be had. The Court of Appeals heard and necessarily disposed of the constitutional claim. The State Supreme Court could have considered the merits despite the procedural flaw but exercised a discretionary power not to pass upon these claims, and where it has discretion either to hear or not to hear, its refusal to pass upon the federal questions cannot rob this Court of jurisdiction. Moreover, its refusal was based upon a highly formalistic and technical procedural rule which has no relation to the decision making process, the rights of the parties in this case, or the administration of the flow of business in the Alabama courts as it affects the rights of other litigants. The rule relating to the size of paper of certiorari petitions is based upon the fact that the record racks in the clerk's office are of a certain size and relates to binding of the record. There is no adequate and substantial nonfederal ground which precludes review here.

Finally, the judgment of the Alabama Court of Appeals, the highest court where review could be had as a matter of right, is reviewable here notwithstanding the fact that the Alabama Supreme Court may have declined to exercise its discretionary certiorari jurisdiction because of an adequate state law ground.

## ARGUMENT

### I.

### Petitioner Was Denied Due Process in That He Was Convicted of a Crime on a Record Devoid of Evidence of Guilt.

The judgment below should be reversed because there was no evidence of petitioner's guilt of any crime. *Thompson* v. *Louisville*, 362 U. S. 199; *Garner* v. *Louisiana*, 368 U. S. 157; *Taylor* v. *Louisiana*, 370 U. S. 154.

Because of the peculiar treatment which the Alabama Court of Appeals accorded this case—putting aside the charge of interfering with an officer (Section 856) and finding petitioner guilty of another offense, i.e. assault (Section 825)—petitioner's argument is divided as follows. First, it will be demonstrated that there was no evidence that petitioner interfered with Chief Moore in the discharge of any legal duty as charged in the complaint. Second, it will be shown that there was no evidence that petitioner committed an assault. In a subsequent portion of the argument (part II), it will be shown that neither ordinance gave fair warning that petitioner's conduct was criminally punishable, and that the conviction thus denies him due process on the ground of vagueness. Then it will be urged (in part III of the argument) that the affirmance of petitioner's conviction on the theory that he committed an assault—in violation of an ordinance under which he had been neither charged, tried, nor convicted—violated due process.

A careful review of the trial evidence leads to the inescapable conclusion that there was no proof that petitioner interfered with, hindered, or prevented Chief Moore from discharging any legal duty. Indeed this failure of proof

might be surmised from the manner in which the opinion of the Alabama Court of Appeals attempted to escape the issue by holding petitioner guilty of another offense subject to the same punishment. "There was no error in his conviction," the Court of Appeals held, "since he could have been clearly convicted of a simple assault" (R. 60).

This attempt to circumvent the question of whether there was evidence to sustain the charge under §856 is readily explainable when it is considered that there was no evidence either that Chief Moore was performing any legal duty or that Shuttlesworth interfered with, hindered, or prevented its exercise. Chief Moore walked up to the group of persons traveling with petitioner and announced peremptorily that he "was arresting them and taking them into custody of the City of Birmingham" (R. 15). Petitioner, who according to the Chief arrived during this announcement (R. 16) immediately walked up to the Chief and asked "what was happening, what was taking place" (R. 18-19). The Chief told Shuttlesworth "to leave the bus station", "to get out of my way", and that "he was not concerned with what was happening there". When Shuttlesworth did not move, but responded by saying "if those people have to be arrested, why, he wanted to be arrested also" (R. 16) then the Chief ordered him placed under arrest and subsequently charged him under §856. Shuttlesworth and the group of freedom riders traveling with him were arrested without any resistance.

First, it is obvious that Chief Moore was not performing a "legal duty" or even a lawful act in purporting to arrest Shuttlesworth's companions for "protective custody". No such crime or concept as "protective custody" appears in the Birmingham or Alabama Codes. The Alabama Court of Appeals said protective custody was "the receiving of some one who places himself voluntarily under the protection

of a peace officer" (R. 59). There is nothing in the record to indicate that Chief Moore intended that the group would have any choice—he told them that he "was arresting them" (R. 15); nothing shows that they agreed to the custody. Certainly if he was asking that the group voluntarily submit to his custody for protection, petitioner's questions as to what was going on would have been entirely natural and appropriate. But actually it rather plainly appears that the group was given no choice about the matter, that the arrest was unjustified, and that petitioner's questions were appropriate in the context of an unjustified arrest. It is quite clear that the members of the group had violated no law which justified an arrest by Chief Moore. They had a right to use public buses without regard to racial segregation customs (*Boynton* v. *Virginia*, 364 U. S. 454; *Gayle* v. *Browder*, 352 U. S. 903), and their right may not be abridged on account of "the possibility of disorder by others" (*Wright* v. *Georgia*, 373 U. S. 284; *Taylor* v. *Louisiana*, 370 U. S. 154; *Garner* v. *Louisiana*, 368 U. S. 157, 174; cf. *Buchanan* v. *Warley*, 245 U. S. 60, 80-81; *Cooper* v. *Aaron*, 358 U. S. 1).

As the freedom rider group had not committed any crime —there has never been any claim that they did—their arrest was unlawful. Alabama law authorizes arrests only under warrant (Tit. 15, Ala. Code §153), or without a warrant for offenses in the presence of an officer or where there is "reasonable cause" to believe the person has committed a felony (Tit. 15, Ala. Code §154). See *Daniels* v. *Milstead*, 221 Ala. 353, 128 So. 447 (1930). The Fifth Circuit recently said that "There is yet no single Alabama case to indicate that the suspected threat of mob violence at the hands of the law breakers may be avoided by arresting those whose actions are perfectly peaceful and legally and constitutionally protected merely because such lawful and peaceful conduct provocatively incites the incipient mob." *Nesmith*

v. *Alford*, 318 F. 2d 110, 120 (5th Cir. 1963). Whatever the Alabama law governing arrests without warrants might be, surely there was nothing in the freedom riders' peacefully waiting for a bus that could meet the test of "probable cause" embodied in the Fourth Amendment (*Henry* v. *United States*, 361 U. S. 98, 102) and made applicable to the states by the due process clause of the Fourteenth (*Wolf* v. *Colorado*, 338 U. S. 25; *Mapp* v. *Ohio*, 367 U. S. 643; *Ker* v. *California*, 374 U. S. 23). The Fourth Amendment no more permits arrests for "protective custody" than it permits arrests on "suspicion" or arrests "for investigation". *Henry* v. *United States*, *supra*; cf. Mr. Justice Douglas, "Vagrancy and Arrest on Suspicion", 70 Yale Law J., 1, 12-13. The sum of the matter is that if Shuttlesworth did interfere with Chief Moore, it was while the latter was making an illegal arrest and not while he was performing a legal duty.

But Shuttlesworth's mere act of asking the Chief what was happening did not "interfere" with the arrests or "prevent or hinder" them. The Chief had already told the assembled group that they were under arrest and none resisted in any way. Nor can Shuttlesworth's failure to instantly obey the chief's command "to go—to get out of my way" and "to leave the bus station" constitute an unlawful interference with the Chief. This did not in fact prevent or hinder the arrests, but in any event Shuttlesworth had no duty to "obey the command of an officer if the command itself is violative of the Constitution" (*Wright* v. *Georgia*, 373 U. S. 284), and Shuttlesworth had a plain right to be in the bus station, as well as to inquire as to the reason for the arrest of his companions.

It is also apparent that petitioner never assaulted Chief Moore or anyone else, at least as assault has been defined

in prior Alabama decisions and as it was defined by the Court of Appeals in this case.

Neither the Birmingham City Code (§825), nor the Alabama Code (Tit. 14, §33) contain any definition of the crime "assault"; the court below made reference to the common law definition of the crime without elaboration or citation (R. 60). But the Alabama courts have many times set out their common law definition of assault in language which clearly excludes petitioner's conduct. They have defined assault as "any attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote, at the time, an intention to do it, coupled with a present ability to carry such intention into effect." *Tarver* v. *State*, 43 Ala. 354, 356 (1869). To the same effect see *Flournoy* v. *State*, 270 Ala. 448, 451, 120 So. 2d 124 (1960); *Taylor* v. *State*, 27 Ala. App. 538, 175 So. 698 (1937); *Burton* v. *State*, 8 Ala. App. 295, 62 So. 394 (1913); *Naler* v. *State*, 25 Ala. App. 486, 148 So. 880 (1933). There was simply no evidence at all that Shuttlesworth made any "attempt or offer" to "do a corporal hurt" to Chief Moore, and there is not a hint of "force or violence" on his part.

It is mystifying to ponder how the Court of Appeals could have thought petitioner guilty of assaulting Chief Moore without finding him guilty of interfering with him. In any event, the Court of Appeals found an assault because it said that petitioner "blocked the chief's path using words from which the intent to do so 'in rudeness or in anger' could probably and rationally be inferred". Apart from the fact that this was a new and unique statement of the Alabama law of assault, and that none of the cases cited by the court below remotely resemble what occurred here,[4] there was simply no evidence that petitioner either

[4] Among the cases cited by the court below were *Patterson* v. *Sylacauga*, 40 Ala. App. 239, 111 So. 2d 25 (1959) where the

"blocked the chief's path" or used any words "in rudeness or in anger". There was no evidence that the Chief was attempting to walk anywhere, and none that petitioner "blocked his path" or barred his way. At most petitioner moved in front of the chief to ask him a question while the chief was standing and talking with the group. There was nothing to indicate that petitioner's language was rude or angry in tone or in content; indeed, all the evidence is to the contrary. There is nothing unusual, and certainly no assault, in standing near a person while talking to him, which is all that the evidence shows Shuttlesworth did.

It is a "violation of due process to convict and punish a man without evidence of his guilt". *Thompson* v. *Louisville*, 362 U. S. 199, 206. Inquiring of a police officer as to what is happening to one's companions when they are ordered arrested in "protective custody", and refusing to leave a bus station where one has a right to be as a paying passenger, is neither an interference with an officer under Birmingham Code §856 nor an assault punishable under city code §825. The conviction should be reversed and the petitioner discharged.

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defendant, among other things, advanced on an officer with a butcher knife and subsequently knocked him across a room; *Kennedy* v. *State*, 39 Ala. App. 676, 107 So. 2d 913 (1958) where the defendant fought with the sheriff until two deputies came to his assistance and subdued him; and *Anderson* v. *United States*, 132 A. 2d 155 (D. C. Mun. Ct.) aff'd 253 F. 2d 335 (D. C. Cir. 1957) where the defendant pushed a policeman.

## II.

**The Law Under Which Petitioner Was Convicted Is Unconstitutionally Vague and Fails to Warn That Petitioner's Conduct Is Made Criminal.**

The factors which make it apparent that there was no evidence to support the conviction under §856 (and/or §825) may also enable it to be perceived as constituting a conviction based upon a law (or laws) which failed to give fair warning. Indeed *Thompson* v. *Louisville*, 362 U. S. 199, 206; rested in part upon *Lanzetta* v. *New Jersey*, 306 U. S. 451, a leading case articulating the vice of vague criminal laws. Petitioner had a perfect right, founded on the Fourteenth Amendment, to be present and to await his bus in the public bus terminal and a similar right to inquire as to the basis for the unlawful arrest of his companions. As this Court said in *Wright* v. *Georgia*, 373 U. S. 284:

> ". . . a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute. Cf. *Winters* v. *New York*, 333 U. S. 507; *Stromberg* v. *California*, 283 U. S. 359; see also *Cole* v. *Arkansas*, 333 U. S. 196."

There is nothing in §856 which gives warning that one can be punished for refusing to obey an officer's unjustified command to leave a public bus terminal, or punished for a mere peaceful inquiry as to the reason for an officer's arrest of one's companions, and certainly not where the officer's contemporaneous statement of the basis for the arrest—e.g. "protective custody"—plainly reveals it to be an unlawful arrest. The assault ordinance equally fails to warn

that this type of peaceful conduct is punishable, there being nothing in the text of the ordinance or in the common law definition of assault often repeated by the Alabama courts from which one could so infer. It would require extraordinary prescience to know that a conversation such as petitioner's conversation with Chief Moore is criminally punishable. Convictions under criminal laws which give no adequate notice that the conduct charged is proscribed violate the due process clause of the Fourteenth Amendment. *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Connally* v. *General Construction Co.*, 269 U. S. 385; *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81; *Edwards* v. *South Carolina*, 372 U. S. 229.

## III.

**Petitioner's Conviction Was Affirmed Under a Criminal Statute, the Violation of Which Had Not Been Charged, Contrary to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.**

This Court's holding in *Cole* v. *Arkansas*, 333 U. S. 196, compels reversal of this conviction. The complaint under which petitioner was charged, tried and convicted alleged that he "did knowingly and wilfully interfere with, burden or prevent a police officer of the City of Birmingham; . . . in the discharge of his legal duty," "in violation of Section 856" of the Birmingham City Code.

Petitioner argued to the Alabama Court of Appeals that his conviction under §856 should be reversed because based on no evidence. Without discussing this issue, the Court of Appeals held that "there was no error in his conviction since he could have been clearly convicted of simple assault" under §825 (R. 60).

Whatever may be the meaning of the two city ordinances involved here, it is clear that they proscribe separate and distinct offenses, notwithstanding that they are both punishable under the same code provision which deals with all misdemeanors under the Birmingham Code. The problems of proof and defense are obviously different. Whatever the relationship between the two laws, and the opinion below leaves this in substantial confusion, it is clear that the complaint never warned Shuttlesworth that he had to defend against a charge of assault or be at all concerned with §825, and that the trial court never found him guilty under §825.

This disposition of the appeal denies due process, for it rests affirmance upon an assault ordinance under which petitioner had never been charged, tried or convicted. Indeed the word "assault" was never mentioned at any time during the trial. This disposition of the case disregards one of the most fundamental requirements of due process—that a person be informed of the specific charge made against him and be heard in defense thereof. An affirmance of this kind in effect convicts the defendant without a trial, as was noted in *Cole* v. *Arkansas*, 333 U. S. 196, unanimously reversing a conviction in similar circumstances:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. Re Oliver, 333 U. S. 257, 273, decided today and cases there cited. . . . It is as much a violation of due process to send an accused to prison following conviction of a charge on

> which he was never tried as it would be to convict him upon a charge that was never made. *Dejonge* v. *Oregon*, 299 U. S. 353, 362. (333 U. S. at 201.)

Where, as here, a state provides an appellate procedure, the proceedings in the appellate court are "a part of the process of law" under which a defendant is held in custody, and must meet basic standards of fairness. *Cole* v. *Arkansas*, 333 U. S. at 201. This Court has not departed from the simple and just proposition stated in *Cole*,[5] and should not do so now.

## IV.

**This Court Is Not Precluded From Reviewing the Judgment of the Court of Appeals of Alabama Where the Supreme Court of Alabama Refused to Consider the Merits Because the Certiorari Petition Filed There Was Not on "Transcript Paper."**

Discussion of the procedural issues appropriately may begin with 28 U. S. C. §1257 which confers jurisdiction on this Court to review certain judgments of "the highest court of a State in which a decision could be had." One seeking review here must have utilized all available procedures for obtaining review of an inferior state court decision in the state's highest court, whether it is available as of right[6] or only in the discretion of the state courts.[7] But when a litigant reaches a "dead end" short of the state's highest court (as here where there is no further review

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[5] The *Cole* case has been cited with approval in *Garner* v. *Louisiana*, 368 U. S. 157, 164; *Paterno* v. *Lyons*, 334 U. S. 314, 320; and *Thompson* v. *Louisville*, 362 U. S. 199, 206.

[6] *Southern Electric Co.* v. *Stoddard*, 269 U. S. 186.

[7] *American R. Express Co.* v. *Levee*, 263 U. S. 19.

as of right and efforts to secure further discretionary review have failed), this Court may review the judgment of the inferior court since it is the highest one "in which a decision could be had."[8] These settled propositions clearly point to the Court of Appeals of Alabama as the highest court "in which a decision could be had" in the circumstances of this case. Decisions by that court were reviewed here in *Anderson* v. *Alabama*, 364 U. S. 877; *Gober* v. *Birmingham*, 373 U. S. 374; and *Shuttlesworth* v. *Birmingham*, 373 U. S. 262.

The relevant Alabama law grants to the Court of Appeals of Alabama "final appellate jurisdiction . . . of all misdemeanors, including the violation of town and city ordinances" (Title 13, Ala. Code §86). Petitioner could obtain review of that court's decision only by seeking a writ of certiorari in the Supreme Court of Alabama, which is empowered to issue "such other remedial and original writs as may be necessary to give it general superintendence and control of inferior jurisdictions" (Ala. Const. of 1901, §140), and which has provided for exercise of this power by considering applications for writs of certiorari "for the purpose of reviewing or revising any opinion or decision of the court of appeals" (Ala. Supreme Court Rule 39, Appx. to Tit. 7, Ala. Code 1958, pp. 1178-1179).[9]

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[8] *American R. Express Co.* v. *Levee*, *supra*.

[9] Rule 39 provides:

*CERTIORARI TO COURT OF APPEALS.*

This court will not in term time, nor will the justices thereof in vacation, receive or consider an application for the writ of certiorari, or other remedial writ, or process, for the purpose of reviewing or revising any opinion or decision of the court of appeals, nor entertain, consider, or issue a writ of error, as authorized by section 98 of Title 13 of the Code, unless it appears upon the face of the application therefor that application has been made to said court of appeals for a rehearing of the point or decision complained of, and that said application had been

When petitioner's conviction was affirmed by the Court of Appeals, and it denied rehearing, he sought certiorari (clearly the proper remedy) in the Supreme Court by filing a timely petition and an appropriate supporting brief. This attempt to invoke the discretionary certiorari jurisdiction of the Supreme Court was conformable to the established rules and practice except in one respect, i.e., petitioner did not comply with Alabama Supreme Court Rule 32 governing the type of paper to be used for such petitions. Rule 32 stipulates *inter alia* that applications for " . . . the writ of habeas corpus, mandamus, or other writ or process depending on motion of this court, . . . shall

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decided adversely to the movant, and the application to this court must be filed with the clerk of this court within fifteen days after the action of said court of appeals upon the said application for rehearing. The application for any such writ must be accompanied by a brief pointing out and arguing the point or decision sought to be revised or corrected. If the court, upon preliminary consideration, concludes that there is a probability of merit in the petition and that the writ should issue, it shall be so ordered, of which due notice shall be given by the clerk to the parties or their counsel, and the case shall stand for submission, as herein provided, on briefs and likewise oral argument if so desired. If oral argument is desired by petitioner, statement to that effect shall be filed with the clerk by petitioner within ten days after service on petitioner of the notice of issuance of the writ. If oral argument is desired by respondent, then he or his counsel shall, by endorsement on the last page of his brief, so state his desire. If neither party shall thus indicate a desire for oral argument, the clerk of this court shall, when briefs from all parties have been filed with him as herein provided, immediately submit the case in term time upon the transcript and such briefs. If either party shall have made known a desire for oral argument, the clerk of this court shall endorse that fact on the proper docket and set the case down for oral hearing not less than ten days after notifying the parties, or their attorneys of record, in writing of such setting. Cases so set for oral argument shall be heard on the day set unless continued by the court for good cause shown.

Respondent's brief shall be filed with the clerk of this court within fifteen days after service on respondent of the notice of the issuance of the writ, and if not filed within that time, or within any extended time, the cause shall stand ready for submission.

be presented on folio paper, of the pattern now required by the rule for ordinary transcripts, so that the same may be suitable for binding; and no application shall be heard that is not so presented." The paper mentioned is about 10½ x 16 inches in size.[10] Petitioner ran afoul of this rule when his attorneys filed the petition for certiorari on ordinary legal cap paper (8½ x 14 inches) and the court below entered an order striking the petition for certiorari.[11]

It is submitted that this procedural lapse cannot deprive this Court of jurisdiction for several reasons, stated here summarily, and elaborated below. First, the Alabama Supreme Court could have exercised its discretionary jurisdiction and considered the merits of the petition notwithstanding the procedural flaw. Such a discretionary refusal to consider a federal claim cannot prevent this Court from exercising jurisdiction. *Williams* v. *Georgia*, 349 U. S. 375.

Second, assuming, *arguendo*, that the Alabama Supreme Court was without discretion to review the petition not on transcript paper, the rule so harshly works a forfeiture by exalting form and ritual that it cannot, in view of the opposing interests at stake, be regarded as a state ground for decision adequate and substantial enough as to prevent review here. *Staub* v. *Baxley*, 355 U. S. 313; *Rogers* v. *Alabama*, 192 U. S. 226.

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[10] "Rule 21. Paper of Transcripts

"All transcripts of records must be on paper of uniform size, according to the same furnished by the clerk of the supreme court, with a blank margin, at the top, bottom, and sides of each page, of an inch and a half, exactly conforming to those marked on the sample."

[11] The record does not reveal the reason why paper other than transcript paper was used. But it is relevant to consider the extremely heavy volume of civil rights litigation handled by only a very few lawyers in some states in understanding how this could have occurred. See 1963 Report of the United States Commission on Civil Rights, 117-119.

Finally, even where a state Supreme Court's refusal to grant a discretionary review is based on an adequate state ground, the federal questions necessarily decided by the intermediate appellate court are properly reviewable in this Court. Cf. *Hammerstein* v. *Superior Court*, 341 U. S. 491.

To consider the above points in detail, it is first submitted that the Alabama Supreme Court did have discretion to consider the merits of Shuttlesworth's petition despite the fact that it was not on transcript paper. As will be demonstrated, the Alabama courts have considered the merits of cases despite noncompliance with the transcript paper rule (Rule 32) as well as other Supreme Court rules. Rule 32 was adopted by the Court in 1865[12] and was first applied to strike a certiorari petition in 1946.[13] Earlier the rule had been applied to mandamus petitions[14] and since 1946 it has been applied on a number of occasions.[15] But in cases involving both mandamus and certiorari petitions

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[12] The rule appears at 38 Ala. 12 (January term 1866), and in subsequent Codes and Supreme Court reports without amendment except for its number.

[13] *Peterson* v. *State*, 248 Ala. 179, 27 So. 2d 30 (1946).

[14] *Aust* v. *Sumter Farm & Stock Co.*, 209 Ala. 669, 96 So. 2d 872 (1923) (mandamus denied because not on transcript paper). The *Aust* case is the first such use of the rule. Earlier the court had indicated that it would tolerate some "informality" in requests for mandamus, though it was not clear in what respect the requests for mandamus did not conform to this rule. See *Ex Parte Tower Manufacturing Co.*, 103 Ala. 415, 15 So. 836 (1893), and *Brady* v. *Brady*, 144 Ala. 414, 39 So. 237 (1905), both of which are discussed in *Ex Parte Jackson*, 212 Ala. 496, 103 So. 558 (1925).

[15] The Court has on occasion said such things as "the requirement of Supreme Court Rule 32 is mandatory" (*Accardo* v. *State*, 268 Ala. 293, 105 So. 2d 865 (1958)) and "we have no alternative but to strike" the petition (*Metropolitan Life Ins. Co.* v. *Korneghy*, 260 Ala. 521, 71 So. 2d 301 (1954)). But in the many decisions under the rule the Alabama courts have never expressly stated that noncompliance deprived the court of jurisdiction, and the force of the above quoted statements is weakened by the courts' actual actions in the cases discussed in the text *infra*.

not tendered on transcript paper the Alabama courts have demonstrated their power to consider the merits. The first such case was *Ex Parte Wood*, 215 Ala. 280, 110 So. 409 (1926), involving a petition for mandamus to review a decree fixing alimony *pendente lite*. The petition was not filed on transcript paper, but the court nevertheless delivered a lengthy holding that petitioner had not sustained his burden of proof, before adding that "another reason" for denying the petition was the transcript paper rule. Then in *Houston* v. *State*, 265 Ala. 588, 93 So. 2d 439 (1957), the court "struck"[16] a nonconforming certiorari petition but only after having acceded to a request to consider the merits. The Court said:

> Subsequent to submission, appellant became aware that the petition was not on transcript paper and requested leave to remedy this defect. In view of this request, *we have considered the petition on its merits and find no reason to reverse* the judgment of the Court of Appeals. The writ would have been denied had the application not been stricken. (Emphasis supplied.)

While the action of the Court in *Houston* was not unambiguous, and the court has rejected a subsequent attempt to induce it to consider the merits of such cases,[17] the one

[16] And it will be noted that in the opinion below in this case, and in many others, the Alabama Courts have said that such petitions were "stricken." But the significance of this terminology is not apparent because the court has seemingly used the terms "denied" and "dismissed" interchangeably with "stricken" in transcript paper cases. See *Ex Parte Wood, supra; Aust* v. *Sumter Farm & Stock Co., supra* ("denied"); *Elks Lodge* v. *State*, 264 Ala. 223, 86 So. 2d 396 (1956) ("denied"); *Bates* v. *General Steel Tank Co.*, 256 Ala. 466, 55 So. 2d 218 (1951) ("dismissed"); *Maddox* v. *City of Birmingham*, 255 Ala. 440, 52 So. 2d 166 (1951) (same); *Stovall* v. *State*, 257 Ala. 116, 57 So. 2d 642 (1952) (same); *Morgan Plan Co.* v. *Beverly*, 255 Ala. 235, 51 So. 2d 179 (1951) (dismissed; denied).

[17] See, e.g., *Jemison* v. *State*, 270 Ala. 589, 120 So. 2d 751 (1960).

clear thing about *Houston* is the court's plain statement that *it did consider the merits* of the petition. Even more striking is the action of the Alabama Court of Appeals (which is bound by the same Rule 32) in *Ex Parte Nations*, 154 So. 2d 762 (1963). Nations, a prisoner appearing *pro se*, sought certiorari to review an unfavorable trial court ruling on his habeas corpus petition, and the Attorney General moved to dismiss on several grounds including failure to use transcript paper. However, the Court said that it was "not disposed to cut off a prisoner's post-conviction remedies merely on the bald reference to the Rule" and went on to "dismiss" the petition and "deny" the writ on the ground that it sought to "rehash" claims made in earlier habeas corpus proceedings. The Court stated the purpose of Rule 32 was "to leave well bound records" and added:

> . . . The size of the paper has prescribed the size of the record racks and the use of much space in the Judicial Building. To change the system of record keeping would entail a considerable expense. Moreover, the use of noncomplying paper (unless promptly filmed) gives no assurance against fading and rot.

While the *Nations* opinion made reference to the problem of whether litigants have the means to secure transcript paper, there was no statement that such paper was not available to Nations or that he had even so contended. It can only be inferred that the Court found it sufficient that the state made no showing that the paper was available to this particular prisoner.

In addition to these cases where the court has considered the substance of a case before it notwithstanding that it was not on transcript paper, it is worthwhile to consider cases where the court has condoned infringement of its other rules. In *Mitchell* v. *Helms*, 270 Ala. 8, 115 So. 2d 664 (1959), a litigant who wrote his assignments of error

on transcript paper but did not have them bound into the record was subsequently allowed to "write the assignments on the transcript" before submission of the case.[18] The Court has also been liberal in excusing non-compliance with its rules prescribing the contents of briefs, thus further demonstrating its discretionary power to excuse violations of its own rules.[19]

This, then, is a case where the Court had power to consider the merits but declined to do so, and *Williams* v. v. *Georgia*, 349 U. S. 375, should apply. In *Williams*, the state courts had power to consider and grant an extraordinary motion for new trial but refused. This Court concluded that "the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us" (349 U. S. at 389).

Second, even if it be assumed, contrary to the demonstration above, that the Alabama Supreme Court was without discretion to review the petition, this harsh and ritualistic rule cannot be regarded as such an adequate and substantial state ground for decision as to prevent review here.

Under Alabama practice the certiorari petition itself is a relatively brief document setting out the claims and

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[18] Cf. *Hunter* v. *L. & N. R.R. Co.*, 150 Ala. 594, 43 So. 802 (1907), permitting a litigant, on rehearing, to correct an error in filing his assignments of error on separate sheets of paper. But see *contra*: *Pugh* v. *Hardyman*, 151 Ala. 248, 44 So. 389 (1907); *Gates Lumber Co.* v. *Givens*, 181 Ala. 670, 61 So. 30 (1913); *Patton* v. *Colbert County*, 265 Ala. 682, 92 So. 2d 691 (1957). See also, *Wilson* v. *Howard*, 266 Ala. 636, 98 So. 2d 425 (1957).

[19] *Wood* v. *Wood*, 263 Ala. 384, 82 So. 2d 556 (1955); *City of Montgomery* v. *Mott*, 266 Ala. 422, 96 So. 2d 766 (1957); *Quinn* v. *Hannon*, 262 Ala. 630, 80 So. 2d 239 (1955); *Schmale* v. *Bolte*, 255 Ala. 115, 50 So. 2d 262 (1951); *Simmons* v. *Cochran*, 252 Ala. 461, 41 So. 2d 579 (1949); *Edge* v. *Bice*, 263 Ala. 273, 82 So. 2d 252 (1955).

points made and requesting relief;[20] the brief which must accompany the opinion elaborates the arguments.[21] But the brief itself need not be filed on transcript paper.[22] Ordinary legal cap paper also will suffice for petitions for rehearing, *Redwine* v. *State*, 36 Ala. App. 560, 61 So. 2d 715 (1952). The requirement as to the size of the paper to be used in certiorari petitions is not relevant to the ultimate just adjudication of claims, as are numerous procedural requirements. It is unlike time limits which help establish finality of decisions. It does not regulate the flow of business in the courts, thereby affecting the just and prompt disposition of other litigation. It does not serve any interests of the opposing party. It is not like rules which aid the court in properly understanding and disposing of the merits of a case, as might be true with rules governing the contents of briefs or assignments of errors or even rules regulating the size of type or printing or to insure legibility.[23] While it is a rule, and should be obeyed and not deliberately flaunted, it relates only to record keeping and filing problems—to binding the record and storing it in filing racks of a particular size. This is not a consideration to be ignored and Alabama might perhaps treat it by means of cost type sanctions, or by requiring resubmission of documents on proper size paper, or perhaps even by striking state law claims, but petitioner submits Alabama cannot foreclose this Court from considering federal constitutional issues on the basis of

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[20] See, Jones, Alabama Practice and Forms, §§6392, 6393; Ala. Supreme Court Rule 39.

[21] Ala. Supreme Court Rule 39.

[22] Ala. Supreme Court Rule 8 provides only that briefs be typed or printed, clearly legible, and bear the name and address of counsel.

[23] Cf. Rosenberg & Weinstein, *Elements of Civil Procedure*, pp. 2-3 (Foundation Press, 1962).

that determination. This Court may well determine that its interest in protecting the constitutional rights of those charged with crime and threatened with imprisonment through flagrant infringement of the constitution weighs more heavily than any obligation to defer to state procedural peculiarities bearing no relation to the decision making process. In *Staub* v. *Baxley*, 355 U. S. 313, the Court rejected an argument that failure to comply with a state requirement that a defensive pleading "count off, one by one, the several sections of the ordinance" was an adequate state ground. The requirement was characterized as "an arid ritual of meaningless form." Similarly in *Rogers* v. *Alabama*, 192 U. S. 226, this Court disregarded an asserted nonfederal ground based on the prolixity of a pleading. In *Carter* v. *Texas*, 177 U. S. 442, it refused to allow a defendant's federal claim to be evaded on the ground that his bill of exceptions did not list the witnesses he proposed to call and their intended testimony.

The nonfederal ground put forward in this case has even less substance than those in the *Staub*, *Rogers*, and *Carter* cases where the state grounds, though procedural, at least had a connection with the decision making process. The state ground put forward by Alabama here relates to a mechanical requirement totally unrelated to the rights of other litigants, or to the effective functioning of the court, or to the merits of the case, which no litigant would intentionally disobey, and the breach of which might readily be cured if the state rule did not work a strict forfeiture.

Finally, in *Hammerstein* v. *Superior Court*, 341 U. S. 491, this Court held that it need not consider the force of an expression by the California Supreme Court that its denial of hearing from the judgment of a lower court was based on an adequate state ground, where the federal ground had been decided by the inferior court. The Court

said: "We do not consider the force of that statement since it is clear that the judgment properly before us is that of the District Court of Appeal, which did decide the federal question. . . . We have jurisdiction over that judgment." (341 U. S. at 492.) This was a holding that where an inferior court was the highest court in which a case might be heard as of right, and an attempt had been made to secure discretionary review in the state's highest court, it did not matter that the latter court might have declined review because it conceived that an adequate state ground supported the judgment. Application of this principle would permit this Court to review the judgment of the Alabama Court of Appeals in the instant case. It should be noted that this result is not at all affected by the outcome of the *Hammerstein* case—the fact that this Court declined to exercise its discretionary jurisdiction. That result obtained because of a circumstance not at all present here, e.g., Hammerstein's failure in a parallel but separate proceeding to use the remedy which could have gained him a review of the same issues as of right. Indeed, there is a substantial qualitative difference between a procedural lapse which pertains only to form like petitioner's, and the mistake made in cases where the wrong remedy was sought, as in one aspect of *Hammerstein, supra* (mistaken use of certiorari rather than appeal) and in *McMaster* v. *Gould*, 276 U. S. 284 (attempted appeal without leave of court). Petitioner's mistake did not work any impediment limiting the Alabama Supreme Court's practical opportunity to exercise its discretionary jurisdiction, or deprive that Court of its jurisdiction. He should not be held to have inadvertently waived his right to review by this Court of the plain errors of constitutional dimension upon which his conviction and the Alabama Court of Appeals' affirmance of it rest.

## CONCLUSION

**For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.**

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York 19, New York

PETER A. HALL
ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue, North
Birmingham, Alabama

*Attorneys for Petitioner*

*Of Counsel:*

MICHAEL MELTSNER
GEORGE B. SMITH

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 168.

FRED L. SHUTTLESWORTH,
Petitioner,

vs.

CITY OF BIRMINGHAM,
Respondent.

## RESPONDENT'S BRIEF IN REPLY TO PETITIONER'S BRIEF ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

J. M. BRECKENRIDGE,
600 City Hall Building,
Birmingham 3, Alabama,
Attorney for Respondent,
City of Birmingham.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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Petitioner's brief refers correctly to the reporter citations of the opinions below. They are 149 So. 2d 921 and 149 So. 2d 923.

Under the heading "Jurisdiction" respondent rests his claim for jurisdiction of this Court on 28 United States Code, Section 1257 (3) stating that "Petitioner having asserted below and claiming here the deprivation of rights, privileges and immunities secured by the Constitution of the United States." The record does not bear out the

statement of Petitioner. Petitioner did not raise any issue whatsoever, constitutional or otherwise before the Supreme Court of Alabama, the Court of last resort in this state. He completely ignored Supreme Court Rule 32, which **mandatorily** requires the dismissal of **any** petition for certiorari not filed as required by this rule. An examination of the cases hereinafter cited will show that the Supreme Court of Alabama has always considered that a violation of this rule under the **same** conditions that Petitioner violated it **requires** the Court to dismiss a petition for certiorari. This rule has been applied equally against all litigants since its adoption as a rule of the Supreme Court. Does the Petitioner desire **equal** treatment of the Supreme Court of Alabama with other litigants or does he insist that he should receive **preferential** treatment? Should he expect the Supreme Court of Alabama to take the position that he need not comply with the mandatory rules of that Court? If so, on what grounds does he claim preferential treatment? Certainly under the decisions of this Court the Supreme Court of Alabama as well as other state agencies is required to apply their rules and the law without regard to race, religion or creed. The Petitioner has repeated the word "discretionary" in relation to the Alabama Supreme Court rule which he ignored apparently in the hope that this Court will hold that the application of such rule is discretionary. But the application of the rule is not discretionary. If it **were** discretionary, should the rule be applied to Jones and waived for Smith? The rule cannot be said to have been adopted or enforced because of so called civil rights litigation because it long anti dates the reversal of the separate but equal doctrine by this Court and has consistently been enforced over the years in all cases civil and criminal where certiorari to the Alabama Court of Appeals was applied for. Footnote 11 on page 25 of Respondent's brief seems to indicate that one may look outside the

record for the reason why paper other than transcript paper was used and attempts to explain it by a statement that an "extremely heavy volume of civil rights litigation (is) handled by only a very few lawyers in some states . . .." We submit that such is not the case and if it were so, it would not abrogate a rule of Court applicable to all alike, the busy, those with leisure, the white and the black, and enforced over the years without discrimination of any sort. The Supreme Court of Alabama has consistently ordered stricken every application for certiorari to the Court of Appeals of Alabama which was not submitted on transcript paper as mandatorily required by Supreme Court Rule 32. The Petitioner chose to ignore this rule and thereby has not presented to the Supreme Court of Alabama in the manner prescribed by **its rules the alleged constitutional questions which he is attempting to present to this Court.**

The Opinions of the Supreme Court of Alabama wherein petitions for certiorari to the Court of Appeals of Alabama were stricken because such petitions were not on transcript paper are too numerous to mention. A few of such cases are the following: **Stovall v. State**, 257 Ala. 116, 57 So. 2d 641; **Duckett v. State**, 257 Ala. 589, 60 So. 2d 357; **Smith v. State**, 264 Ala. 264, 86 So. 2d 842; **Ladd v. State**, 266 Ala. 586, 98 So. 2d 59; **McDonald v. Amason**, 267 Ala. 654, 104 So. 2d 719; **Accardo v. State**, 268 Ala. 293, 105 So. 2d 865; **Ex Parte Davis**, 269 Ala. 58, 110 So. 2d 306; **Ex Parte Cranmore**, 273 Ala. 4, 129 So. 2d 688.

This Court has held that the law of practice of a State must be complied with in order to properly bring constitutional questions to this Court. An orderly method for judicial review of this Court could reasonably require no less. This Court has recognized this and has so held.

The rule in this regard is stated in **John v. Paullin**, 231 U. S. 583, 34 S. Ct. 178, 179, 58 L. Ed. 381:

"Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, and the law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. Calian v. Bransford, 139 U. S. 197, 35 L. Ed. 144, 11 Sup. Ct. Rep. 519; Brown v. Massachusetts, 144 U. S. 573, 36 L. Ed. 546, 12 Sup. Ct. Rep. 757; Jacobi v. Alabama, 187 U. S. 133, 47 L. Ed. 106, 23 Sup. Ct. Rep.; Halbert v. Chicago, 202 U. S. 275, 281, 50 L. Ed. 1026, 26 Sup. Ct. Rep. 617; Newman v. Gates, 204 U. S. 89, 51 L. Ed. 385, 27 Sup. Ct. Rep. 220; Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191, 195, 53 L. Ed. 963, 965, 29 Sup. Ct. Rep. 546."

It has long been settled that the Supreme Court acquires no jurisdiction to review the judgment of a State court of last resort unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or **necessarily** decided by such state court of last resort. **Whitney v. People of State of California**, 274 U. S. 357, 47 Sup. Ct. 641.

It is also fully settled that where a constitutional question is not properly presented to the State Appellate Court of last resort, and for this reason, under state practice, is not decided or passed upon by such Court of last resort, the question is not before the Supreme Court on certiorari to the State court. **Barbour v. State of Georgia**, 249 U. S. 454, 39 S. Ct. 316, 317; **Louisville & Nashville Railroad Company v. Woodford**, 234 U. S. 46, 34 S. Ct. 739, 741; **Taylor v. City of Birmingham**, 35 Ala. App. 133, 45 So. 2d 53, **cert. den.**, 253 Ala. 369, 45 So. 2d 60, **cert. den.**, 340 U. S. 832, 71 S. Ct. 45; **Michel v. State of Louisiana**, 340 U. S. 832, 71 S. Ct. 45.

We respectfully submit that this Court should not review this case on the merits because of failure of the Petitioner to properly present the Constitutional question to the Court of last resort in the State of Alabama, i. e., The Supreme Court of Alabama.

The Petitioner on page 2 of his brief states that this case involves Section 1 of the 14th Amendment to the Constitution of the United States.

Section 1 of the 14th Amendment is as follows:

"Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Petitioner at page 10 of his brief says he was

". . . denied due process of law secured by the Fourteenth Amendment in that he was convicted of crime without evidence of guilt . . ."

Without waiving our contention that the Petitioner is not entitled to a review of the alleged constitutional questions argued in his brief by this Court under 28 United States Code, Section 1257 (3), or otherwise because he has not presented such questions to the Supreme Court of Alabama so as to obtain a decision on such constitutional questions (Whitney v. People of State of California, 274 U. S. 357, 47 Sup. Ct. 641) we will now discuss the other issues argued by the Petitioner.

Was the Petitioner convicted of an offense without evidence of guilt?

The Petitioner was tried in the Circuit Court of the Tenth Judicial Circuit of Alabama. He was tried by a Judge sitting without a jury. This was the Petitioner's choice. The Petitioner could have been tried before a jury had he so elected. Section 587, Title 37, Code of Alabama of 1940, as amended. The City of Birmingham is not authorized to demand a jury for the trial of a case appealed from its Recorders' Court. **Ex Parte Hall**, 255 Ala. 98, 50 So. 2d 264.

The complaint under which the Petitioner was convicted charged as follows:

> "Comes the City of Birmingham, Alabama, a municipal corporation, and complains that Fred L. Shuttlesworth, within twelve (12) months before the beginning of this prosecution, and within the City of Birmingham or the police jurisdiction thereof, **did knowingly and wilfully interfere with, hinder,** or prevent **a police officer of the City of Birmingham; namely, Jamie Moore, Police Chief** for the City of Birmingham, **in the discharge of his legal duty** in that said defendant did knowingly and **wilfully place himself between said officers and a group of people commonly called 'freedom riders' when said people were being placed in protective custody** by said officer, and said defendant **did** knowingly and **wilfully refuse to move out of the way of said police officer after being so ordered, contrary to and in violation of Section 856 of the General City Code of Birmingham of 1944.** (Emphasis added.) (R. 4.)"

Section 856 of the General City Code of Birmingham is as follows:

> "Any person who knowingly and wilfully opposes or resists any officer of the city in executing, or at-

tempting to make any lawful arrest, **or in the discharge of any legal duty,** or who in any way interferes with, hinders or prevents, or offers or endeavors to interfere with, hinder or prevent such officer from discharging his duty, shall on conviction, be punished as provided in section 4." (Emphasis added.)

All courts in the State of Alabama take judicial notice of all ordinances, laws and by-laws of the City of Birmingham. Acts of the Regular Session of the Legislature of Alabama of 1943, page 183; **Monk v. Birmingham,** 87 F. Supp. 538; **Smiley v. Birmingham,** 255 Ala. 604, 52 So. 2d 710.

Section 910 of the General City Code of Birmingham of 1944 of which this Court has judicial knowledge is in part as follows:

"Sec. 910. Functions of Department.

(a) General. The Police Department shall be charged with the **preservation of the peace and order of the city, the protection of all persons** and property within the city, and the enforcement of all criminal ordinances and all criminal laws of the city and the state. The department shall suppress all riots, disturbances and breaches of the peace . . ." (emphasis added).

Section 6 of the General City Code of Birmingham of 1944 is as follows:

"Sec. 6. Election between provisions for purpose of prosecution.

In all cases where any person is charged with an act or omission which is prohibited or made punishable by different sections of this code or by different ordinances, the court may elect on which of said ordinances or sections to proceed, and all further

proceedings in the case shall be in reference to and controlled by such election (1930, § 4914)."

Let us take said Section 856 under which the Petitioner was convicted and examine it as to whether it is "unconstitutionally vague" as argued by him. The ordinance is clearly directed against any one who "hinders" an officer in the discharge of his duty. "Hinder" is a common word and means interfere, impede, encumber, retard, delay, obstruct, block or thwart (See standard dictionaries). Certainly said Section 856 is not vague as to what is meant. It is in the public interest that bystanders, busybodies, agitators, race baiters and others should not hinder a police officer in the performance of his duty of maintaining law and order and preserving the peace. The fact that the word "hinder" is applicable to different degrees of conduct does not make it so vague as to be unintelligible. Said Section 856 of the 1944 City Code was brought forward from the 1930 City Code where it appeared as Section 5495. An ordinance similar to this is found in the ordinances of many cities and in state laws. Even the Congress has enacted statutes making it an offense to "hinder" a public officer in the performance of his duty. Among others, 34 Stat. 157, 159, provides in Section 11 as follows:

"Sec. 11. That no person shall interfere with any member of the board for the condemnation of insanitary buildings or with any person acting under authority and by direction of said board in the discharge of his lawful duties, nor **hinder**, prevent, or refuse to permit any lawful inspection or the performance of any work authorized by this Act to be done by or by authority and direction of said board" (emphasis added).

This Court in **District of Columbia v. Little**, 339 U. S. 1, 70 S. Ct. 468, discussed phraseology similar to the phraseology of said Section 856. If said Section 856 is

"unconstitutionally vague" as argued by the Petitioner, the **Little** case, supra, does not so indicate as to a similarly worded regulation or law. In **Little** this Court commented on the fact that the regulation there involved did not include the word "hindering". In Little this Court indicated that the use of the word "hindering" would enlarge on the proscribed acts referred to in the District regulation under consideration with these words:

> "It (the District regulation) does not even prohibit 'hindering' or 'refusing to permit any lawful inspection,' in sharp contrast with a separate inspection statute enacted by Congress for the District which adds these phrases to prohibitions against 'interference' and 'prevention'."

We respectfully submit that said Section 856 is not "unconsfitutionally vague" as argued by Petitioner. If it were so, the regulations discussed in Little would also be unconstitutionally vague and many other laws and ordinances throughout this county would likewise fall and great injury to the public interest will result and law enforcement officers will be impeded in their efforts to enforce the laws.

We respectfully contend that said ordinance is valid and constitutional.

The next question we submit is to determine whether or not the complaint charges the Petitioner with an offense under said Section 856. The complaint charges the Petitioner with the following conduct.

> ". . . **did knowingly and wilfully interfere with, hinder,** or prevent **a police officer of the City of Birmingham; namely, Jamie Moore, Police Chief** for the City of Birmingham, **in the discharge of his legal duty** in that said defendant did knowingly and **wilfully**

**place himself between said officers and a group of people commonly called "freedom riders" when said people were being placed in protective custody** by said officer, and said defendant **did** knowingly and **wilfully refuse to move out of the way of said police officer after being so ordered, contrary to and in violation of Section 856 of the General City Code of Birmingham of 1944."**

The above complaint clearly charges that the defendant interfered with and hindered the Police Chief in the discharge of his legal duty. The particular act which constituted interference or hinderance was set out specifically in the Complaint as follows:

> "(the Petitioner) did knowingly and wilfully refuse to move out of the way of said police officer after being so ordered . . .."

The record clearly shows that the Petitioner did interfere with or hinder the Chief of Police in performing his duty. The record shows the following facts relating to the arrest of Petitioner.

At the time the Petitioner was arrested there was a large crowd in and around the bus station (R. 16, 20, 21, 28, 37, 38). Captain Jack A. Warren estimated the size of the crowd to be approximately 250 or 300 persons (R. 32). The crowd was in a boisterous and jeering mood and some of the crowd yelled out, "Take the police away and we will take care of it" (R. 16). Other witnesses also testified as to the dangerous emotion of the crowd or mob. Captain James W. Garrison testified things were tense at the bus station (R. 26, 27), and he felt the Freedom Riders were in danger actually of their lives (R. 27). The attitude was belligerent, storming, and overall anger (R. 28), and it was directed toward the Freedom Riders (R. 29). Captain Jack A. Warren testified there was a great

deal of tension at the bus station (R. 31, 32): "You could see it in the faces of the people in the crowd, you could tell it in the talking to themselves and their muttering and trying to press forward toward the bus loading platform. I was very much aware of that. As a matter of fact, that is the reason I was there" (R. 32). Officer T. T. Trammell testified there was a lot of unrest at the station and it seemed like everything could erupt in one fast moment (R. 37, 38).

At the time of Petitioner's arrest there were 30 or 35 or maybe 40 policemen at the bus station, and during the week approximately 80 per cent of the entire police force was engaged at the bus station at one time or another (R. 29). The duties of these officers were described by Captain James W. Garrison as follows: "Well, we had some officers that stayed right with these Freedom Riders all the time. We had others that was assigned to keep back the crowds. We had others to work traffic at the different intersections. **We had 19th Street blocked entirely** and had 7th Avenue blocked between 18th and 19th Streets to avoid cars just continuing in a circle. And some were inside the bus station and stayed in the waiting room the entire time" (R. 28, 29).

The Freedom Riders were unable to get a driver to drive the bus (R. 28, 29, 42, 43).

**The conduct of the Petitioner hindered or interfered with Chief Jamie Moore when he was placing the Freedom Riders in protective custody** (R. 26, 31).

Petitioner's attorney asked Captain Garrison of the Police Department a direct question as follows: "Did the defendant's conduct in any way make your arrest or your duty in putting these people under protective custody any harder?" Captain Garrison answered "Yes . . . by continually getting between us and them . . . and he kept

milling around and wouldn't move on when we asked him to and things were kind of tense over there at that particular time" (R. 26).

Chief Moore told the Freedom Riders who he was, i. e., Chief of Police of the City of Birmingham, and that he was taking them into protective custody due to the circumstances at the bus station (R. 15, 16, 17, 22).

Chief Moore told the Petitioner to leave the bus station, that he was not concerned with what was happening, but the Petitioner did not leave but got between Chief Moore and the Freedom Riders and would not leave on order.

Captain James W. Garrison also told the Petitioner to move on, and the Petitioner continued to interfere (R. 22, 23).

The Petitioner knew Chief Moore and his capacity with the City (R. 45, 46).

Pages 43, 44 and 45 shows by the Petitioner's own testimony that he was hindering or interfering with Chief Moore. His answer to his own Counsel's question was as follows:

"Q. What did the Chief say when he walked up to the group?

A. He identified himself and said, "I am Chief Moore," or words to that effect, Chief of the Birmingham City Police, and we have decided to arrest you all for your own protection."

And I asked him what did he say, and he said he decided to arrest us for our own protection. And then he recognized me in the crowd and he said, "Shuttlesworth, are you with the group?"

I said, "I am. We have been trying to get the bus out for two hours or more."

And he said, "Well, you go on, I don't want any trouble out of you."

And I said, "I am with the group and I want to catch a bus." And he said "If you don't go on, I will have to arrest you." And I said, "Well, whatever happens on all them will happen to me; we are all together." . . .

. . . Q. Did you say anything other than what you had just testified to?

A. That was the substance of what was said.

Q. Is that all of what you said in substance?

A. Yes. After he repeated the second time for me to go home, then he said to this Officer Garrison, I believe, "Put him under arrest."

The Petitioner was a resident of the City. The substance of the record clearly shows that at the time the freedom riders were taken into protective custody for their own protection the Police believed all of them to be nonresidents passing through the City of Birmingham en route to Montgomery, Alabama, and that they were marooned in the Bus Depot. The police knew the Petitioner to be a local man and that he did not come into the City with the freedom riders.

The presence of the freedom riders in Birmingham at that time (only a few days after a bus had been burned on the highway), only a few days after other so called freedom riders had been attacked at another bus station in the City (R. 16) the refusal of bus drivers to take out any bus on which they rode, the crowd or mob gathered around the bus station, the coming of night time all presented a grave crisis. **The issue of law and order was paramount. The record in this case is completely devoid of any protest, objection or resistance of the freedom riders to being taken into protective custody.** The action of the police in furnishing the freedom riders with a safe

place of refuge probably saved some of their lives, as well as the lives of others, and the record indicates they accepted this safe place of refuge without objection or comment.

The Police acted to maintain law and order. The Police acted on facts which were apparent to them. The Police are not constitutional lawyers and should not be. They acted in a practical manner. Their actions were not objected to by the freedom riders. The Petitioner hindered or interfered with the action of the Police in removing the freedom riders from the scene, which removal was necessary in the judgment of the Police to prevent a riot. The action of the Police was successful. Their action prevented serious injury or loss of life. They are to be commended. The Petitioner did wilfully interfere with the police officer in maintaining law and order.

The Petitioner argues that he was convicted of "Assault" for which he was not charged. He argues this because the Court of Appeals of Alabama stated that he could have been convicted of simple assault. Certainly if a person assaulted a police officer while the officer was in the performance of his duty, he could be prosecuted under either the section relating to assault or said Section 856 of the City Code. Under such circumstances the same facts would justify a conviction under either section and the prosecuting authorities could elect which section to proceed under. Section 6 of the General City Code of the City of Birmingham of 1944 clearly provides for this election as follows:

> "Sec. 6. Election between provisions for purpose of prosecution.
>
> In all cases where any person is charged with an act or omission which is prohibited or made punishable by different sections of this code or by different

ordinances, the court may elect on whic' of said ordinances or sections to proceed, and all further proceedings in the case shall be in reference to and controlled by such election. (1930, § 4914.)"

So it is clear that the Petitioner was **not** convicted of violation of a law for which he was not charged. The Court of Appeals of Alabama stated that "Shuttlesworth blocked the Chief's path. . . ." The evidence set out in the record supports this and shows that Shuttlesworth would not leave the scene free of arrest so that the Chief of Police could proceed with his work of preventing a catastrophe.

The Petitioner claims he has a constitutional right to get in the way of the police officers. He was a stranger to the proceedings between the Chief and the freedom riders. He was not in transit as they were. Whether or not the Freedom Riders could have constitutionally been taken into custody was a matter between them and the officers. No attempt was made to take the Petitioner into protective custody. All he had to do was leave the area in the station where the Freedom Riders were being escorted to a place of refuge.

Suppose the police had decided that the white people in the vicinity of the bus station had a constitutional right to go where they pleased so long as no law was then presently being broken. Chief Moore testified that some of the people who were threatening trouble were arrested around the bus station that day and ". . . we moved lots of people away from the bus station. Some more were arrested in and around there" (R. 20). The record indicates there were white people who refused to leave the bus station or refused to move on when ordered or otherwise indicated they might cause trouble and they were arrested. You cannot cure a riot (such as had happened at another

Birmingham bus station previously and had happened in the City of Montgomery, Alabama) after it has started any more than you can cure cancer after it reaches the terminal stage. Medical experts tell us cancer can be cured if caught soon enough and police officers know that the correct way to handle a riot or a mob is to recognize its early manifestations and to **prevent its occurrence or formation.** That is what the officers did in this case. Suppose a lawabiding white citizen insisted upon driving around the block by the bus station when ordered by the police not to do so. Could such a person constitutionally claim the right to do so and thus hinder the work of the police? If a lawabiding citizen could do so, then a person bent on creating disorder could do the same. If the Petitioner could claim a right to mingle with the transit freedom riders over the objections of police, then on what ground could the two or three hundred people milling around the bus station be denied a right to do the same. If they had been so permitted, does this Court not know what would have happened?

We do not wish to depreciate constitutional rights. But constitutional rights are not unlimited. A great justice of this Court once said that freedom of speech carries with it no right to yell "Fire" in a crowded theatre. Due process of law does not prevent the destruction of private property when necessary to prevent the spread of a fire.

The Petitioner argues that the Chief of Police was not **in the discharge of a legal duty.** He appears to take the position that the taking of the freedom riders into protective custody and furnishing them a safe place of refuge was an illegal arrest. First whether it was a legal or illegal arrest or no arrest at all is a matter between the officers and the freedom riders and not between the officers and the Petitioner. It cannot be disputed even by the peti-

tioner that the action of the police was motivated by anything but a desire to **protect** the freedom riders. The record shows no malice by the police against the freedom riders or the petitioner. The Chief did not want to have the Petitioner arrested and told him so. He was asked to leave. The petitioner **insisted on his own arrest** even though he was told that he was not being arrested (R. 44).

Section 910 of the General City Code of 1944 places a duty upon the Police Department as follows:

> "The Police Department shall be charged with the preservation of the peace and order of the City, the protection of all persons and property within the City. . . ."

Thus, the police were attempting to preserve the peace and protect persons and their actions were calculated to do this, a duty placed upon them by ordinance, at the time Petitioner hindered or interfered with them. There can be no argument that the end result the preservation of peace and the protection of persons was a legal duty which the police were required to accomplish, if possible. Therefore, they were in the discharge of a legal duty whether or not the means selected was proper or improper. The police did not intend that the means or method which they determined was necessary should affect the Petitioner. He introduced himself into the scene. He was an interloper. He was a bystander who kept getting in the way. He was arrested and convicted of violating a valid ordinance of the City of Birmingham. If the Petitioner is not subject to arrest then will not a police officer be subject to harassment and interference by third persons who are so inclined to interfere whenever he makes an arrest in a public place? Should such an officer be required to discuss the facts and the law involved with third persons at the time of the arrest and submit to such third persons

congregating around the place of arrest so as to endanger the safety of the officer and his prisoner or prisoners.

Should this court reverse this conviction because of the actions of the officers in taking the freedom riders into protective custody, it is respectfully suggested that it consider what would in all probability have happened to these same freedom riders and to the outnumbered officers of the law had the police not acted as they did.

The general scope and authority of a police officer in giving orders in the performance of his duty was discussed in **State v. Taylor,** 18 A. 2d 36, 38 N. J. Super. 6, in the following language:

> "* * * The duty of police officers, it is true, is "not merely to arrest offenders, but to protect persons from threatened wrong and to prevent disorder. In the performance of their duties they may give reasonable directions." People v. Nixon, 248 N. Y. 182, 188, 161 N. E. 463, 466. Then they are called upon to determine both the occasion for and the nature of such directions. Reasonable discretion must, in such matters, be left to them, and only when they exceed that discretion do they transcend their authority and depart from their duty. The assertion of the rights of the individual upon trivial occasions and in doubtful cases may be ill-advised and inopportune. Failure, even though conscientious, to obey directions of a police officer, not exceeding his authority, may interfere with the public order and lead to a breach of the peace.' People v. Galpern, 259 N. Y. 279, 181 N. E. 572, 83 A. L. R. 785 (Ct. App. 1932).
>
> "Failure to obey a police order to 'move on' can be justified only where the circumstances show conclusively that the order was purely arbitrary and was not calculated in any way to promote the public order.

> As was said in the Galpern case, the courts cannot weigh opposing considerations as to the wisdom of a police officer's directions when he is called upon to decide whether the time has come in which some directions are called for."

Police officers of this nation face trying times in the maintenance of law and order. Law and order is paramount to all benefits flowing from a free society. Without law and order, all other benefits would be from a practical standpoint nonexistent. All the laws on the books designed to maintain law and order depend upon the police officers of our cities and the peace officers of the counties and the states. These officers are in the front line of battle. We respectfully contend that orders or directions of a police officer designed to maintain law and order in a public place should be obeyed without question by the public unless such order is so unreasonable as to be arbitrary and capricious. This we believe is necessary to public protection. It is the reason why the term "police power," as applied to municipalities and the state, has never been and cannot be limited by definition. A police officer of a municipality, in acting under municipal ordinances, is exercising a portion of the police power of the municipality which is necessary to the maintenance of law and order. If orders of a police officer given by him for the purpose of protecting persons, performing his duty, preventing eminent violations of laws, or preventing riots are not sustained when they are not clearly arbitrary and capricious, we risk public disorder on a large scale.

The action of the police officers in this case was not arbitrary or capricious and was reasonably designed to maintain law and order and protect the persons of the freedom riders. They were not charged with violating any law and did continue their journey when bus drivers were available.

We respectfully contend that the judgment of the Court of Appeals of Alabama should not be disturbed.

Respectfully submitted,

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J. M. BRECKENRIDGE,
600 City Hall Building,
Birmingham 3, Alabama,
Attorney for Respondent, City of Birmingham.